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THE

CIVIL LAW

IN ITS NATURAL ORDER.

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OF SUCCESSIONS.

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WHEREIN ARE CONTAINED DIVERS REMARKS, AND MANY PRINCIPLES OF GREAT IMPORTANCE IN THE MATTERS TREATED OF, IN THIS SECOND PART.

I. *The Reasons for distinguishing Successions from Engagements.*

2408. We have distinguished the matters belonging to successions from those that relate to engagements, which have been examined in the first part. For although successions contain some kinds of engagements, such as those of the heir or executor to the creditors and legatees of the person to whom he succeeds, and those of coheirs and coexecutors to one another; yet it was not proper to consider successions under this view of the engagements which they may happen to contain, because these kinds of engagements are nowise essential, but only accessory, to successions: and it may sometimes happen that a succession contains no manner of engagement, as in the case where there is one only heir or executor who succeeds to an inheritance free from all manner of debt, legacies, and other burdens; whereas in the matters contained in the first part, such as covenants, tutorships, guardianships, the administration of the affairs of communities, and all the others, the engagement is essential to their nature: and all these matters are of themselves, and in their own nature, so many ties and engagements which God has made use of for supporting and

maintaining the society of mankind in all places; as it is the nature of successions to preserve and continue it to all ages.[a] So that it was necessary to distinguish successions from all those other matters, as being of a different order, which requires a separate rank.

II. *The Necessity of Successions, and in what Manner they have been regulated by the Laws.*

2409. *The Nature of Successions, and their Use.* — Successions are the ways by which the goods, the rights, and the charges of those who die, pass to other persons who succeed in their places, and represent them. It appears evidently enough, that successions are natural in the order of the society of mankind, and that it was necessary to transmit the use of the goods of the generation which passes to that which succeeds. But it does not appear so clearly in what manner this change ought to be regulated, and what is the natural order of it; that is, whether this order is naturally such, that the goods of those who die ought to pass entirely to their children, or, in default of children, to their other near relations; or whether the dying persons may dispose of their goods, in whole or in part, in favor of other persons who are strangers to them; or even whether there might not be some other way of transmitting the goods of one generation to another successively.

2410. *Three Ways of transmitting the Use of the Goods of one Generation to another.* — If we suppose that, in the beginning of the society of mankind, the first who entered into that state did take into consideration the ways of transmitting the use of the goods of one generation to another; there were three principal ways which they could not fail to have in their view, among others which might probably occur to their thoughts in such a deliberation.

2411. The first way is, by considering all the goods as if they ought to be in common to all men, no man having a right to any thing but what he should consume for his own use. And upon this supposition, in whatever manner this total community of goods among all men should be regulated, there would neither be heirs nor successions, in the same manner as it is in regular communities, where all the goods of the community belong to

[a] See the fourteenth chapter of the *Treatise of Laws*, no. 2.

the body, and none of the particular members have a right of property in any part of them.

2412. *Successions, Legal and Testamentary.* — The two other ways suppose that all the goods do not belong in common to all men, but that every one may have something that is properly his own, exclusive of others. One of these ways is that of legal successions, which are so called because they transmit all the goods of those who die without having disposed of them to the persons whom the laws call to the succession by virtue of their proximity of blood, according to their order of descendants, ascendants, and collaterals. The other is that of testamentary successions, which transmit the goods of those who die to the persons whom the deceased have called to the succession by a testament.

2413. Of these three ways, the first, which would render all things common to all men, would be so full of inconveniences, that we see plainly that it is impossible. For the love of justice and equity not being common to all men, nor the only principle of the conduct of each particular person, the universal community of all goods would be a system altogether impracticable among so great a number of partners, so full of self-love, and so much wedded to their own particular interests. And it would be equally unjust, as it is impossible that all things should be always in common to the good and to the bad, to those who labor and to those who sit idle and do nothing, that those persons who know how to make a right use and a just distribution of the goods should be on the same level with those who have neither the fidelity necessary to preserve the goods to the society, nor the prudence that is requisite for the right disposal of them, and who would do nothing but consume and waste them. So that the state of a universal community, which might have been equitable and useful among men perfectly just, living in a state of innocence, and free from passions, cannot but be unjust, chimerical, and full of inconveniences among men such as we are now-a-days. And we ought not to draw any consequence, from the societies which we see among the particular persons who live in regular communities, to a universal society of a whole nation, of a whole people, or even only of a town or other corporation. For that which preserves those regular communities is, that they are not made up of many families, who are to be maintained according to their condition, and according to the number of persons in each family; but consist only of single persons, who are subject to their superiors, hav-

ing no share in the administration of the goods and affairs of the society, and who are allowed no other use either of the said goods, or even of their own liberty, but what is prescribed by the rules of the religious order which they profess. This is what cannot be put in practice in a body that is composed of many families.

III. *Of the Two Sorts of Successions, which are called Legal and Testamentary.*

2414. It is not, therefore, without reason, that no government, where there has been any thing like order, has ever put in practice the universal community of all things among all men; but they have observed the two other ways of succession, to wit, the *legal*, which is likewise called the succession of intestates, because it takes place when any one dies without making a testament, and the *testamentary* succession. And the use of these two ways of succession has been differently intermixed. For seeing both the one and the other have their foundation in the order of society, they have been both received in all places. And since they reciprocally derogate one from another, they have been reconciled divers ways, as shall be explained hereafter.

IV. *The Order of Legal Successions.*

2415. *Three Kinds of Heirs, Descendants, Ascendants, and Collaterals.* — There are three orders of legal successions, according to three orders or degrees of persons whom the laws call to succeed. The first is the order of children, and other descendants; the second is that of fathers and mothers, and other ascendants; and the third is of brothers and sisters, and other near relations, who are called collaterals; because that whereas the descendants and ascendants are in one and the same line, which unites them successively one to the other, the brothers and all the other more remote relations are among themselves at the side one of another, every one in his own line under the ascendants which are common to them.

2416. *First Order, Succession of Children to Parents.* — The first of these three orders, which calls the children to the succession of their parents, is altogether natural, as being a consequence of the order which God has established, by giving life to men by the birth which they derive from their parents. For since life is a gift which renders the use of temporal goods necessary, and since

God gives them as a second benefit, which is a consequence of the former; it is natural that, the goods being an accessory to life, those which belong to the parents should pass to their children, as a benefit which ought to accompany that of life. And this rule, which is part of the divine law, as well as of human laws, is so just and so natural, that it is engraven on the minds of all mankind.[a]

2417. *Second Order, Succession of Parents to Children.* — The second order, which calls the ascendants to the succession of the descendants, is not natural, as the first is, which makes the descendants to succeed to the ascendants. For as it is conformable to the order of nature that the children should survive their parents, so it is contrary to the said order that the parents should outlive their children. But when that case does happen, it would be against natural equity that the parents should be deprived of the sorrowful comfort of succeeding to their children, and that they should suffer at the same time both the loss of their persons, and likewise that of their goods.[b] And the same reason which unites to the benefit of life that of the temporal goods, and which makes the children to receive both the one and the other from their parents, demands likewise that, when the ascendants survive the descendants who die without children, they should not be deprived of their goods; since, the children and the other descendants holding their life of their parents, the goods of the children are destined by nature for supplying the necessities of the life of those to whom they owe their own. So that, in one sense, the succession of ascendants to descendants is agreeable to the law of nature, as well as that of descendants to ascendants: and both the one and the other are a consequence of the strict union that is between these persons, and of the mutual duties which God has established between them. For one of the principal effects of that union and of those duties is the reciprocal use which nature gives to the children of the goods of their parents, and to the parents of the goods of their children, making them as it were common to both. This is the reason why the laws of the Romans, even before they knew any thing of the Christian religion, considered the goods of parents as the property of their children, and the goods

[a] See chap. 3 of the *Treatise of Laws*, no. 3. *Gen.* xv. 4; — *Rom.* viii. 17; — *Prov.* xiii. 22; — *l.* 7, *D. de bon. dam.*

[b] *L.* 7, § 1, *D. si tab. test. nul. ext. unde lib.*; — *l.* 6, *D. de jure dot.*; — *l.* 15, *D. de inoff. test.*

of the children as belonging to their parents in the same manner; and looked upon their mutual successions to one another to be not so much an inheritance which brought them any new right, as a continuation of that right which seemed to make them masters of the goods of one another.[c]

2418. *Remark on the Succession of Ascendants.* — It is to be remarked, touching this natural equity, which calls the ascendants to the succession of the descendants, and which was observed in the Roman law, that, upon another principle of equity, the customs of France have established another rule, which is, that goods acquired by descent from our ancestors do not ascend; that is to say, that the father, and the other ascendants on the father's side, do not succeed to the goods of their descendants which they have inherited on the mother's side, and which are called, goods of maternal inheritance; and likewise, that mothers, and the other ascendants on the mother's side, do not succeed to the goods of their descendants which came to them by the father's side, and which are termed goods of paternal inheritance. This rule is a consequence of another rule of the same customs, which directs the goods of paternal inheritance to be appropriated to the nearest heirs of blood on the father's side; and the goods of maternal inheritance to be appropriated in the same manner to the nearest heirs of blood on the mother's side. And this rule, which is commonly expressed by these words, *paterna paternis, materna maternis*, hath its justice founded on the same natural law which appropriates the goods to the nearest relations. For this appropriation of the goods to the heirs of blood does naturally respect those who are of the family from whence the goods come. And this justifies the rule, which deprives the ascendants of the property of the goods of inheritance belonging to a descendant, which came to him from another stock, to the end that the goods come from one family may not pass to another, as it would happen if the paternal goods should ascend to the maternal ascendants, or the maternal goods to the paternal ascendants, who would transmit them to their heirs, and by that means take them away from the family from whence they came. But these customs leave to the ascendants the movables and acquisitions of their descendants, and the goods of inheritance which descended from their stock, together with the usufruct of the goods of inheritance come from

[c] *L.* 11, *D. de lib. et post.*; —*l.* 1, § 12, *D. de success. ed.*

the other stock. Which has this double effect, that it preserves the goods of inheritance in the same families from which they came, and likewise provides what seems to be equitable in favor of the ascendants.

2419. *The Third Order, Succession of Collaterals.* — The third order of legal successions, which is that of *collaterals*, is founded on the same natural equity which calls the descendants and ascendants to successions. For the goods which ought to pass from the deceased to his descendants, or in default of them to his ascendants, go naturally to those who represent the said ascendants, and who derive from them their origin, in common with the deceased. Thus, we may say in general of these three sorts of successions, of descendants, ascendants, and collaterals, that all the persons who are united by birth in one of these three orders are considered as one family, to which God has appropriated the goods of all the particular persons whereof it consists, in order to make them to pass from one to the other successively, according to the degree of their nearness of kin. And, in fine, this succession by proximity is so natural, that it has been confirmed by the divine law.[d]

2420. To this we may subjoin, as another principle of the equity of succession by proximity of blood, which is a consequence of the former, that, although there were no other law for successions besides the will of those who dispose of their goods, it would be just and natural that every one should call his nearest relations to succeed to his estate, unless he should have particular reasons that might oblige him to dispose of it otherwise. For the union which is formed by birth between ascendants, descendants, and collaterals, being the first tie which God instituted among men, to unite them together in society, and to engage them to the duties of mutual love; every one, in the choice of an heir, ought to have regard to those persons to whom God, by this first tie, has united him more strictly than to others, and not to deprive them of his goods without a just cause. Thus, we may say that the legal successions have this in their favor, that they are not only conformable to the order and institution of nature, which calls to the succession the nearest relations, by the right of blood, and by appropriating the goods to the families; but they are likewise most consistent with the love and affection which those who dispose of their goods ought to have for their relations, unless they have

[d] *Numb.* xxvii. 8, 9, 10, 11.

rendered themselves unworthy of the succession, or that some other reasonable motives may have induced the testators to dispose of their estates another way. It is upon this equity that the customs of France are founded, which appropriate estates unto families in such a manner, that they do not permit persons to dispose of all their goods to the prejudice of the collateral relations, even the most remote, as shall be observed hereafter.

V. *The Origin of Testamentary Successions.*

2421. *Use of Testaments.* — Testamentary successions have likewise their foundation in the order of society; and we may observe in the said order different causes which may justify the liberty of disposing of our goods by testament. Thus, it may happen that a man has no relations at all, or that those which he has have rendered themselves unworthy of succeeding him; and in this case, the equity of a testament is clear and evident. In like manner, one who has perhaps a small, inconsiderable estate, and which he owes to the liberality and bounty of some benefactor, who happens to be at that time in great want and necessity, might justly leave either all his goods, or a part of them, to his benefactor; and that to the prejudice of his collateral relations, who perhaps are related to him only at a great distance, and have a plentiful estate of their own. It is just, likewise, that those persons whose presumptive heirs are strangers, that is, aliens, or foreigners, incapable of succeeding, may dispose of their estates to others. Thus, bastards, not being born in lawful wedlock, have no relations who can succeed to them; and if they die intestate, without leaving any children lawfully begotten of their own body, they can have no heir at law, not even their mother. So that it is just that they should have liberty to dispose of their goods by testament. Thus, in fine, it is just and equitable in general, that all persons who are capable of disposing of their goods should have liberty to acquit themselves of the duties of gratitude, and of other engagements which may oblige them to give, if not all their goods, at least a part of them, to other persons than their heirs at law, or next of kin. And this liberty of disposing by testament is more especially favorable in those goods which the testator may have acquired by his own labor and industry. Thus, Jacob disposed of the spoil which he had taken from the Amorites by the force of his arms, in favor of Joseph, preferably to his brothers.[a]

[a] *Gen.* xlviii. 22.

2422. From all these considerations we may infer, that, as legal successions are natural in the order of society, so likewise dispositions in view of death, whether it be of all one's goods or of a part of them, have their justice and equity in the said order: and we see also that testaments are authorized by the law of God.[b]

VI. *The Use of Testaments reconciled with the Legal Successions.*

2423. *The Origin of the different Dispositions of the Roman Law, and of the Customs, with Respect to Testaments.* — It is because of this natural equity, which is in the succession of near relations, and of the natural equity which appears likewise in testaments, that we see both the use of legal successions, and also that of testaments, received in all places. But if it is just and natural that successions should pass to the nearest relations whom the law calls to succeed, how can it be likewise just and natural that they may be deprived thereof by a testament? And the laws which call the nearest relations to succeed, shall they have their effect only when there are no dispositions which deprive them of the succession? Or, seeing these laws are a part of the law of nature, will it not be just that they should have their effect without regard to the will of those who have goods to leave after their death, and that at least they may not have power to deprive their near relations, unless it be of a part of their inheritance?

2424. All those who have made laws to regulate the matter of successions have without doubt examined this question; for they have been sensible of the natural equity which calls the nearest relations to succeed, and they have likewise been persuaded that it is just to allow those who have goods to make dispositions of them which may be executed after their death. Thus, they having all of them seen the contrariety which seems to arise from the use of these two principles, they could not fail to consider, under all these views, what might be the most proper means of reconciling them together.[a]

2425. They have not therefore been ignorant, that, in order to make a right use of these two laws, it was necessary to look upon that which calls the heirs of blood, as a first general rule, which gives them all the goods of the succession, when there is no just

[b] *Galat.* iii. 15; — *Heb.* iii. 16, &c.; — *Gen.* xlviii. 5; — 2 *Kings* xx. 1; — *Isaiah* xxxviii. 1.

[a] See *Treatise of Laws*, chap. 11, no 7 and no. 31.

cause to deprive them of them. From whence it follows, that when they granted the liberty to persons to dispose either of all their goods, or of a part of them, they supposed that he who chooses other heirs than those of his blood, or who gives a share of his goods to other persons, ought to have some particular motives which induce him to dispose of his succession otherwise than the law would dispose of it. For it was not their intention to countenance unreasonable dispositions, which should have only for their motive some passion, or humor, and to grant an inconsiderate liberty of making all sorts of dispositions, just or unjust; since the good order of society doth not permit, even in matters which have their effect in the lifetime of the parties, dispositions which may be any way inconsistent with decency and good manners, and doth not allow prodigals to have the management of their own estates. Thus, the liberty which the laws grant to persons to dispose of their estates by a testament implies, without doubt, according to the intendment of the law, this condition, that the dispositions which they shall make in so serious an act as is that of making a testament shall be according to reason. But although the intention of the laws which permit testaments ought not to be explained in any other sense, since we cannot say that they approve indifferently of all manner of dispositions; yet there would have been too many inconveniences in adding to the law which permits testaments the condition that the dispositions should be reasonable. For this reservation would call in question all manner of testaments, even those that should be the most conformable to prudence and equity; since there would be a liberty given from hence to examine them, and that, by considering them under a different view than what the testator had, it would be an easy matter to call them in question. Since, therefore, it was not convenient to add to the law such a condition, and since it was neither just nor possible to prescribe to every man in particular the manner in which he ought to dispose of his goods, it was necessary that the law which permits testaments should leave it to every one in particular to dispose of his goods as he himself should judge most reasonable, whether by granting to each testator an indefinite liberty to dispose of all his goods, or by restraining this liberty to a part of them; but still leaving it to his own judgment and prudence how he will bequeathe that which the law allows him to dispose of.

2426. From all these general principles, which all mankind must

agree in, we may reasonably draw this consequence, that, since it is agreeable to the law of nature that succession should go to the next of kin, and that it is likewise equitable that those who have goods may dispose of them by will, the spirit and intention of the laws which have permitted the making of testaments has been, that the liberty of bequeathing should be regulated in every one according to prudence, which may determine the use of this liberty to more or less, according to the condition of his estate, his family, and his different obligations to other persons besides his children, if he has any, or his other near relations; for it is by these circumstances, and others of the like kind, the various combinations of which are infinite, that every one ought to regulate his dispositions, and proportion them to his substance, and to the different obligations he lies under. Thus, those who have but a small estate, and a great many children, are less at liberty to dispose of their goods by will, than those who are rich, and have no children. In like manner, those persons who have poor relations are under a greater tie and obligation towards them, than those are whose relations are wealthy and in a good condition. Thus, in general, the circumstances in which every one happens to be point out to him the use of this prudence, which ought to be his rule and guide.

2427. If we consult, therefore, only natural equity, which ought to be the spirit of all laws, we shall be apt to conclude that the principle which justifies this liberty of bequeathing by will is nothing else but the equity that is in the use of this prudence. Thus, it would seem that we may reasonably suppose that those who made the laws concerning successions did agree in this principle, and were divided only in the consequences which they drew from it, and made as it were two parties; from whence have sprung the two different sorts of laws which are extant concerning this matter.

2428. The one is that of the Roman law, the authors whereof thought it proper to leave to every one an entire liberty to dispose of his goods as he pleases;[b] and they did not think the inconveniences arising from the bad use which some might make of this liberty to be a sufficient cause why it should not be left common to all persons; to the end that the condition of those who are reasonable might not be restrained within the bounds which

[b] *Inst. de lege Falcidia.*

perhaps it might be convenient to prescribe to the conduct of others.

2429. The other kind of law concerning successions is that of the customs in France, the authors of which did not judge it convenient to leave particular persons at liberty to have no manner of regard for natural equity, which calls the nearest relations to the succession, under pretext of some few extraordinary occasions, which might justify the use of such a liberty. And they were desirous to prevent the inconvenience of the bad use which might be made of this liberty by those who in making their testaments govern themselves by no other rule beside that of their passions, and under these several views, not being able to make different rules for the different sorts of persons, and not thinking it reasonable to suppose that the greatest part of mankind would regulate their dispositions by a prudent and wise conduct, they set bounds to this liberty of bequeathing for all sorts of persons without distinction. We shall see in the following article some differences which it is necessary to observe between the spirit of the Roman law and the spirit of our customs in France.

VII. *Difference between the Spirit of the Roman Law, and that of the Customs in France.*

2430. It would seem that the manner in which the Romans did first put in practice this law, which gives a general and indefinite liberty to all persons to dispose of their estates as they please, which they derived from the Grecian commonwealths, was a consequence of that spirit of dominion, of which we see so many other marks in their whole conduct, from the foundation of their state, whether it be in relation to other nations whom they conquered, or even with respect to their own families, in which they had assumed to themselves an absolute power of life and death, not only over their slaves,[a] but likewise over their children.[b] Pursuant to this spirit of dominion, they took to themselves the liberty to dispose of all their goods at pleasure, and to deprive, not only their relations of their successions, but even their children, without any cause. It is true, that this might have been a means to keep children in their duty to their parents; but the bad use that was made of this liberty, many disinheriting their children

[a] *L.* 1, § 1, *D. de his qui sui vel al. jur. sunt.*
[b] *L.* 12, *in fine, D. de lib. et post.*; — *l. ult. C. de patr. potest.*

without any just cause, gave occasion to the receiving of the complaints of children against those testaments which they called undutiful, as being contrary to the duties of paternal love and affection. And even these complaints were not received but with this precaution, that in order to give them some color or pretext, and that they might have the effect of annulling those testaments, they should be considered as being made by persons who are not altogether in their right senses, and who were deprived of the use of their reason at the time when they made them.[c] They settled likewise a legitime, or certain portion of the parent's goods, for the children, to whom they appropriated a fourth part of the goods they would have had if their parents had died intestate;[d] and they allowed likewise fathers and mothers, and other ascendants, to exhibit complaints against the testaments of their children, as being contrary to the duty and respect which children owe to their parents.[e] And at last the Emperor Justinian thought he did a great deal in favor of the children, when he augmented their legitime, by giving them, instead of a fourth part, a third of the goods, when there were four children, or a lesser number, and raising it even to a moiety, in case there should happen to be five or more children.[f] But as for the collaterals, there was still left an entire liberty to the testator to deprive them of the whole succession, except in one only case, and that in favor only of brothers and sisters, who were allowed to complain of the testaments of their brothers and sisters, when the heir instituted by them was an infamous or ignominious person. And even this liberty was not extended to those who were brothers and sisters only by the mother's side.[g] Thus, we see that the Roman law considered each testator as a lawgiver in his own family, leaving to him an absolute power of disposing of his goods according to his pleasure, under these reservations alone, which have been just now mentioned.

2431. *The Spirit of the Customs of France, in Relation to Successions.* — This disposition of the Roman law, which leaves persons at full liberty to dispose of all their goods by testament, except the legitimes, which are reserved by law to certain persons, is observed in the provinces of France, which are governed by the written law, that is, by the Roman law; and the law which restrains the liberty of dispositions in testaments, in favor even of

[c] *L.* 2, *D. de inoff. test.*
[d] *L.* 8, § 8, *D. de inoff. test.*; — *l.* 6, *C. eod.*
[e] *Ll.* 14 *et* 15, *D. de inoff. test.*
[f] *Novell.* 18, *c.* 1.
[g] *L.* 27, *C. de inoff. test.*

collateral relations in the remotest degree, has been observed in all the provinces of France which have their peculiar customs. But seeing there is no natural rule which ascertains the precise bounds of the liberty of testaments, and of other dispositions in view of death, and the portion of goods which one may give away from his heirs at law, or next of kin; and that it is only by arbitrary views that these bounds can be settled; they are differently regulated by the customs. And there is only this common to them all, that they have two general rules, which are consequences of the principles which have been just now taken notice of. One, which distinguishes the paternal goods from the maternal, in order to preserve to the relations of each side the goods which have descended from their stock: and the other, which allows of no other heirs besides the next of kin, whom the custom calls to the succession, and which gives only the quality of universal legatees to those to whom persons leave by testament, or other disposition in view of death, all that they can give away; the name of heir remaining proper only to the heir of blood, with this quality annexed to it, which is common in all the customs, that the heir at law is made heir at the moment of the death of the person to whom he succeeds, even although he know nothing of the said death. This rule the customs express in these words:— *The dead man gives seizin to the living, his next of kin that is capable of succeeding to him;* that is to say, that the inheritance accrues to him, with all its rights, at the moment of the death of his relation to whom he succeeds: which hath this effect, that if the said heir should chance to die without knowing that the said succession was fallen to him, he would transmit it to his heirs, in the same manner as if he had declared his acceptance, and taken possession of it. But excepting these general rules, which are common to all the customs, their other dispositions, and particularly those which fix the bounds of the liberty of testaments, are not so common. Some of them grant a liberty to dispose of all the acquisitions, and of all the movables, and appropriate to the heirs of blood only the goods of inheritance, giving leave only to bequeathe a part of them, such as a fourth or a fifth. Others, without distinguishing between the different kinds of goods, movables or immovables, goods of inheritance or goods of purchase,[h] give only

[h] See the distinctions of these several sorts of goods in the title of *Things*, sect. 2, art. 8, 9, 10, 11, 12.

power to dispose of a part of all the goods, such as a fourth. And others, again, allow even those who have no children to dispose only of a part of the immovables, which they themselves have acquired. And besides these precautions of the customs, for the preservation of estates in families, there are some which have restrained the liberty of testaments in another manner; and which, to prevent the facility of engaging dying persons to make dispositions at the suggestion and persuasion of others, have declared the testaments to be null which are not made some certain time before the death of the testator, such as the said customs may have prescribed.

2432. It appears plainly enough, that these dispositions of the customs are founded on this view of appropriating to the heirs of blood the greatest part of the goods, or of certain goods; but they have not all of them provided alike for this appropriation. For in the customs which allow persons the free disposal of all their acquisitions, and of all their movables, those who have no estates which came to them by descent from their ancestors enjoy the same liberty that was granted by the Roman law, and may give away all their goods from their nearest collateral relations, and even from their brothers.

2433. We shall not here offer to draw a parallel between these customs, to show which of them have most or fewest inconveniences. Every one of them hath its own inconveniences, and its own advantages. And this diversity of advantages or inconveniences, which may distinguish the one from the other, is a natural effect of the arbitrary laws. But there is this convenience that is common to them all, that every one hath its fixed rules, which are there looked upon to be just, and which ascertain the quiet of families. However, the great multitude of customs in France, so different one from another, not only in the matter of successions, but also in many others, does naturally give rise to this question, Which would be most useful, whether this diversity of rules, whereof every one is confined to its own place, or one only rule that should be common over all? But we shall not attempt here to make a fruitless inquiry into a question of this importance.

VIII. *Which of the Two Successions is most favorable, the Testamentary or Legal.*

2434. All that has been said hitherto obliges us to make one reflection more, on the comparison or parallel between legal and

testamentary successions, in order to discover which of these two kinds of successions is most favorable, whether that of the heir at law, or next of kin, or that of heirs named by a testament. That is to say, whether, in a case which regards the opposite interest of a testamentary heir and of an heir at law, the right of the one and the other being doubtful and uncertain, we ought to favor one more than the other, and which of the two; as in the cases between a plaintiff and defendant, between a possessor and one who seeks to turn him out of possession, between an accuser and one who is accused, if there is any doubt in any of the said cases, the favor balances always on the side of the defendant, the possessor, and the party accused, upon the bare consideration of these qualities.

2435. We propose here this question, because there may happen cases where it may be necessary to judge of the preference between these two kinds of heirs, and because the rule which decides this preference ought to make in this matter a principle which we cannot well avoid taking into consideration, because of its great usefulness in questions of this nature. Thus, for example, if we suppose that a testator, living in a country where the Roman law is in full force, and having named in a former testament, made exactly according to the form prescribed by law, another heir or executor than the person who ought to succeed to him if he should die intestate, makes a second testament, in which he institutes for his heir or executor the person who ought to succeed to him by law, and this testament is signed only by five witnesses in a country where seven are required; the question which of these two testaments ought to subsist will depend on knowing which of these two heirs ought to be most favored, whether the testamentary heir or the heir of blood. For if it is the testamentary heir, or if both heirs be upon the level, or of equal consideration in the eye of the law, it is certain that, in the competition between these two testaments, the first, which is made according to form, ought to be preferred to the second, which is null. And if, on the contrary, the condition of the heir of blood is the most favorable, his right of blood being backed by the second will of the testator, although defective in point of form, it may be doubted whether this second testament, although imperfect, yet being made in favor of the heir of blood, be not sufficient to annul the first, which was made according to form, but which transferred the goods of the family to a stranger.

2436. It appears plainly enough of what consequence this principle is, which ought to decide this question; since it ought to serve as a foundation for judging other questions of this kind: and that it is of great importance to fix by some certain rule the different regards which judges ought to have, either in favor of the heirs of blood, or in favor of dispositions made in prospect of death, whether it be in the cases where the validity of the said dispositions may be called in doubt, or in other questions which may depend on the right discerning of what may be due to the favor of blood, or to the favor of the will of a testator; as, for instance, if in a testament which should call to the succession the heir of blood, together with a stranger, there should happen to be an obscure or ambiguous clause, of which one meaning may be favorable to the heir of blood, and another to the stranger.

2437. In order, therefore, to examine this question concerning the preference, whether it ought to be in favor of the testamentary heirs, or of the heirs of blood, it will be necessary to add to all the remarks which have been just now made, three reflections on three differences that are between legal successions and successions by testament.

2438. The first of these differences consists in this, that the order of legal successions in the case of intestates is so just and so natural, that it has been established as such by the law of God, which hath confirmed the use of it; whereas that of testaments hath no other origin besides the will of man. And although testaments are approved of in the Holy Scriptures, yet it is not by any disposition which gives them the force of a law, as we see the use of legal successions established there by a law. And even in that part of the scriptures where successions are regulated, there is no mention made of testaments.[a] So that we may say, that the law which permits the use of testaments is as it were an exception to the natural and general law, which calls the nearest relations to successions.

2439. The second difference between successions by testaments and the succession of the heirs of blood is, that the succession of the heirs of blood is absolutely necessary for the order of society; because, when any persons die without having been able to dispose of their estates by will, or having neglected to do it, they must of necessity go to the persons whom the law has called to

[a] *Numb.* xxvii.

succeed to them, and the law has called the next of kin; whereas the said order of society might subsist without the use of testamentary successions, by the bare use of the succession of the heirs of blood, and the customs do not own any other heirs besides those of the blood, as has been already observed.

2440. The third difference consists in this, that there are many inconveniences which attend the liberty of choosing heirs. For many persons, being prejudiced by their passions, make an unjust choice; and it is they themselves who are to blame for these kinds of inconveniences; whereas in legal successions the inconveniences are but few; and those which do happen cannot be imputed to any person whatsoever; they being only the effects of the divine providence, and the natural consequences of a just rule, such as we see do attend very often even the laws which are the most holy and sacred.

2441. From all these reflections we may draw this consequence, that, the legal successions being more natural, more necessary, and attended with fewer inconveniences than the successions by testament, the use of which has been introduced only as an exception to the rule which gives the right of succession to the nearest of kin, the condition of the heirs of blood seems to be more favorable than that of the heirs named by testament; and that in any doubtful case, where it may be allowable to consider the favor of one or the other of these two kinds of heirs, it may seem reasonable to decide in favor of the heir of blood. Thus, in the question before mentioned concerning the two testaments, the former of which, being made according to form, gives the right of succession to a stranger; the second, which, being signed only by five witnesses, would have been declared null had it been made in favor of a stranger, subsists and disannuls the first testament, because the latter calls to the succession the heir at law.[b] This decision is so much the more remarkable, that it is part of the Roman law itself, which has, above all others, favored the testamentary successions, and which otherwise is so very nice and scrupulous in matters of form. So that we may conclude from hence, even according to the sentiment of those who have most favored testaments, that the condition of the testamentary heir is less favorable than that of the heir of blood.

[b] *L.* 2, *D. de injust. rupt. irr. f. test.*; — *l.* 21, § 3, *C. de testam.* See the fifth article of the fourth section of *Testaments.*

IX. *The Reason why we have made all these Remarks.*

2442. We have thought it necessary to make all these remarks on the two kinds of succession, before we enter on the detail of the rules of this matter; and this we have done chiefly for two reasons. One is, that we might give as it were in a plan these general ideas of the nature of successions, which is a subject of a very large extent. The other is, that we might fix and lay down in this plan the grounds and principles on which depend many rules which shall be particularly explained hereafter. And because some other kinds of succession are used in France, which are either altogether unknown in the Roman law, or which have by the customs of France some rules peculiar to them, we have thought fit to add the following remarks concerning them.

X. *Of Institutions of Heirs by Contract.*

2443. Besides the two sorts of successions, legal and testamentary, of which we have spoken hitherto, there is in France a third kind of succession of a quite different nature, which is that of heirs instituted by contract or covenant, that is to say, of heirs instituted by a contract which ascertains to them the right of succession; the use whereof is very frequent in contracts of marriage, in favor of the persons who marry, whether it be that they are instituted heirs by their fathers and mothers, or other ascendants, or by collateral relations, or even by strangers; and some customs allow of these dispositions, not only in contracts of marriage, but likewise in other contracts, as in a general partnership of all the goods of the partners.

2444. These ways of naming heirs or executors are called institutions by contract, which are lawful, and even favorably received in France, because they render marriages more easy and more frequent, the persons who enter into that state having the advantage of being assured of these institutions in their favor, which for this reason are irrevocable; whereas in the Roman law all institutions of heirs by contract were declared unlawful, as being contrary to the liberty which every one has to dispose of his estate by his last will and testament.[a]

2445. *Remarks on some Principles which relate to Institutions by Contract.* — Seeing these institutions by contract are no part of

[a] *L.* 15, *C. de pactis.*

the Roman law, but directly contrary to it, they do not come within the design of this book, and therefore we shall not treat of them expressly. But the reader shall find here all the essential principles, and the rules which are necessary for these sorts of institutions, that is, all the rules which are of natural equity, and upon which one may reason. For we must observe, that all the rules which can have any relation to institutions by contract may be reduced to these kinds. The first kind consists of the peculiar rules which each custom hath established for those sorts of institutions; and all these rules are nothing else but arbitrary statutes, different according to the different customs, and which are easy to be seen in each custom. The second comprehends the rules of successions, whether legal or testamentary, which are of natural equity, and which may be applied to these institutions by contract; and these sorts of rules shall be explained in this second part, every one in its proper place. The third kind is made up of the rules of covenants, as, for example, those which concern the interpretation of them, and the others which may likewise be applied to contracts of succession; and these have been already explained in the first part. So that this book shall contain all the rules of natural justice and equity, and all the principles on which the decisions in the matter of successions by contract may depend; and it will be sufficient for us to take notice here of one essential principle, of great use in this matter, and by which we ought to examine the use of all the particular rules which may have any relation to successions of this kind.

2446. This principle consists in this, that institutions by contract being of a mixed nature, and consisting partly of testaments and partly of covenants, and by consequence their rules being of the same mixture, and consisting of the nature of covenants as well as of testaments, we ought in each difficulty to distinguish which of these two sorts of rules is proper to be applied to it; and to consider whether it is by the rules of covenants, or by the rules of testaments, that the difficulty is to be resolved, according as the one or the other are most applicable to it; for there happen daily in this matter questions of both these natures. And that we may the better comprehend the truth of this principle and its use, it will not be improper to make application of it in some examples of general difficulties which are easy to be resolved, but which may help us to judge of others.

2447. For a first example, we may suppose that it is made a

question, whether one who is instituted heir by his contract of marriage is at liberty, after the death of the person who has made him his heir, to renounce the succession, or whether he is under an obligation to accept it. If this question were to be decided by the rules of covenants, it might seem that, as they form mutual obligations, and that he who has by contract instituted one to be his heir cannot revoke it, so in the same manner he who is instituted heir should be obliged on his part to accept the succession. But as it is essential to the quality of an heir or executor that he should accept the same, not by force, but freely and voluntarily, and that it would be unjust that he who could assure to himself a necessary heir should have the liberty of ruining him, by burdening the succession with debts, legacies, and other charges above the value of the goods, it is plain that this question ought to be decided by the rules of successions, which give to heirs the liberty of accepting or renouncing them, as they find convenient.

2448. If we suppose, for a second instance, that it were called in doubt whether he who has instituted his heir by a contract of marriage may recall that institution at his pleasure; if this question were to be determined by the rules of successions, it would appear just that he might alter this institution, and name another heir. But because this liberty would be directly contrary to the intent of these kinds of institutions, which is to ascertain the succession to the person who is named heir by his contract of marriage, and to give him that assurance by a covenant that is irrevocable; it is by the rules of covenants that this question ought to be decided; and according to those rules, which make firm and irrevocable whatever has been stipulated by a covenant, it is essential to such an institution that it cannot be recalled.

2449. If, for a third example, we put the case, that it were doubted whether he who has made one his heir by contract, not being at liberty to revoke this institution, may nevertheless alienate his goods, and dispose of them at pleasure in his lifetime, in the same manner as if he had made no such institution. If this question were to be decided by the rules of covenants, there would be very good reason to doubt whether the alienations ought to be permitted without any bounds, so as to render the institution of the heir fruitless and of no effect, the person who has instituted him heir having alienated all his goods, or contracted debts that would exhaust them. But as this institution differs from those which are made by testament only in this, that it is irrevocable, to

the end that the heir by contract may be sure of succeeding to the goods which shall remain after the death of the person who has made him heir; this question ought to be decided by the rules of testaments, which give to the heir only the goods which the testator leaves behind him at his death, but do not deprive him of the liberty to alienate or mortgage them during his life. So that this heir by contract could have no ground of complaint, unless it were on account of donations, or other fraudulent alienations, made with design to elude the institution.

2450. It is easy to judge, by these three examples, in what manner we ought to discern, in the questions which may happen to arise concerning institutions by contract, whether the difficulties depend on the rules which belong to the matter of covenants, or on those which are proper to testaments, or whether both these sorts of rules may be applied to them, in the cases which happen not to be regulated by the customs.

XI. *Succession of those who die without leaving behind them any Relations, or any Testament.*

2451. The ways of succeeding of which we have spoken hitherto, have for their foundation either the proximity of blood between the heir and the person to whom he succeeds, or the will of him who makes an heir or executor. But there is another sort of succession, which has neither the one nor the other of these foundations, and which, on the contrary, takes place only when he who leaves goods behind him after his death has no relations, and has made no will. For in that case, it is necessary that the goods which he has left behind him should find a master; and this is what the laws have taken care of.

2452. *Succession of the Husband to the Wife, and of the Wife to the Husband. — Succession of the Exchequer for Want of Heirs.* — By the Roman law the husband and wife succeed one to the other, when any of them who dies first has no descendants, ascendants, or collateral relations, and dies without making any will.[a] And if one who is not married, and who has likewise no heir of blood, dies without disposing of his goods by will, they belong to the exchequer, which in this case holds the place of heir.[b]

2453. This succession of the husband to the wife, and of the wife to the husband, is regulated after this manner, according to

[a] *L. un. C. unde vir. et uxor.*

[b] *L.* 1, *C. de bon. vacant.*

some customs in France. Others, on the contrary, have expressly ordered that the exchequer should exclude the husband and the wife; and some, by a singular hardship, prefer the exchequer, or the lord of the fee, who has the rights of the exchequer, not only to the husband and wife, but even to the nearest relations, unless they be of the stock from which the goods did proceed. But in the other customs of France, which have established nothing touching this matter, and in the provinces which are governed by the written law, it seems just to follow the rule of the Roman law: and we see likewise that it is received into use by several examples. For seeing the Roman law is the common law of France, in every thing which is not abolished, or contrary to usage, it ought with much more reason to be received as law, when that which it ordains is agreeable to the law of nature and equity: and it may be said of the succession of the husband to the wife, and of the wife to the husband, that it is of this order of laws, when other heirs are wanting. And we ought not to look upon this manner of succession as being any way derogatory to the rights of the exchequer; for besides that this case falls out so very seldom, that the consequence of it ought to be counted for nothing, the right of the exchequer in successions ought not to take place, except where there is nobody whom any law calls to the inheritance. And it cannot be said that the husband and the wife are not called to succeed one to the other by any law, seeing they are called thereto by this common law, and that this law which calls them to the succession one of another is founded on the law of nature, and on the divine law, which hath formed so strict a union between the husband and the wife, and which of two distinct persons hath made them one, that they might be the source of the birth of men, and of their relations to one another, the nearest degree of which makes a much slenderer tie and union than that of marriage. Thus, seeing marriage is the source of the relations which give the right to succeed, it is altogether natural to give to the husband and wife the right of excluding the exchequer.

2454. As for the succession of the exchequer, which succeeds when there are no other heirs, it is founded on this, that the goods which happen to have no master pass naturally to the use of the public, and accrue to the prince who is the head of the state, and to whose use goods of this kind, and other casualties, are appropriated by the public, for the maintenance and support of the princely dignity. Thus, in France the successions of those who

die without heirs, or without having disposed of their estates by will, are acquired to the king. In like manner the king has the right of succeeding to bastards, who leave no heirs of their own body, to aliens, and to goods confiscated, of which we shall speak in the three following articles. But these matters not coming within the design of this book, we shall only observe here, in general, the relation which they have to the matter of successions, and that without touching upon the grants, either of all these rights, or a part of them, which have been made by kings to the lords of manors within their respective lands.

XII. *Succession of Bastards.*

2455. We must reckon in the number of successions which accrue to the prince, that of bastards who die without leaving children lawfully begotten of their own bodies, and without disposing of their estates by will. For by our usage no man succeeds to a bastard dying intestate but his children, if he has any lawfully begotten; and they likewise succeed to nobody, except it be by testament. This right of succession to bastards is grounded upon this, that the succession of one who dies intestate is conveyed by the relation of blood that is between the heir and the person to whom he succeeds, and that we do not own any other relation besides that which one has by being born in lawful wedlock. Thus, as to the succession of bastards, our law is different from the disposition of the Roman law, as to which it is not necessary that we should enlarge any farther here.[c]

XIII. *Succession of Foreigners, who are called Aliens.*

2456. There is yet another kind of succession which belongs to the king. It is that of strangers, who are called aliens, that is, those who are born in a country that is not subject to the king, or to which our kings have not granted the right of naturalization, as they have done to some neighbouring nations. By virtue of this right to the successions of aliens, the king acquires the estate of a foreigner who has not been naturalized in France by letters of naturalization; which is founded not only on the Roman law,[a]

[c] *V.* § 4, *Inst. de success. cogn.*; — § *ult. Inst. de senatusc. Tertull.*; — § 3, *Inst. de senat. Orphit.*; — *l.* 29, § 1, *D. de inoff. test.*; — *ll.* 2 *et* 4, *D. unde cogn.*; — *Nov.* 89, *c.* 12; — *v. c.* 15, *eod.* See the eighth article of the second section of *Heirs and Executors in general*, and the remark on that article. See *Gen.* xxi. 10; xxv. 6; — *Deut.* xxiii. 2; — *Gal.* iv. 30.

[a] *V. l.* 6, § 2, *D. de hæred. inst.*; — *l.* 1, *C. eod.*; — *Ulp. tit.* 17, § 1; *tit.* 22, § 2.

but also on the order of nature, which distinguishes the society of mankind into different states, kingdoms, or commonwealths. For it is a natural consequence of this distinction, that each nation, each state, may regulate by its proper laws whatever relates to successions, or the commerce of goods, which may depend on arbitrary laws, and that they may distinguish therein the condition of strangers from that of natural-born subjects. Thus, strangers are excluded from all public offices because they are not of the body of the society which composes the state of a nation, and because these offices require a fidelity and affection to the prince, and to the laws of the kingdom, which it is not to be presumed that a stranger has. Thus, they succeed to nobody, and nobody succeeds to them, not even their nearest relations; and this is so established in order to prevent the riches and wealth of a kingdom from being carried out of it, and from passing into the hands of the subjects of other princes.[b]

XIV. *Confiscations, or Forfeitures.*

2457. By forfeiture, or confiscation, is meant the right by which the king acquires the goods of those persons who are condemned to death, or to any punishment which implies civil death.[a] Thus, forfeiture, or escheat, is a kind of succession which conveys to the king all the goods of the person who is condemned, in the same manner as they would have gone to his heirs, if the law had allowed him to have any. And as in successions the goods remain subject to the burdens thereof, so likewise the charges to which the forfeited goods are subject follow the said goods. And it is the same thing in the case of successions to aliens, bastards, and those who die without heirs.

XV. *Succession of Persons of a Servile Condition.*

2458. Besides all these sorts of successions, which have been just now explained, there is another kind of succession, which is used in some of the provinces of the kingdom of France, where there are effects which the proprietors cannot dispose of by testament, and which go to the lord of the fee when the tenants die

[b] See the ninth article of the second section of *Heirs and Executors* in general, and the other articles there quoted; the third article of the fourth section of the same title, and the remark on it, as also on the twelfth article of the second section of *Testaments*.

[a] See the eleventh article of the second section of *Heirs and Executors* in general, and the other articles there cited.

without children. This is differently regulated in different customs, according to the conditions which were agreed on in relation to this right when it was first established; in the same manner as we see the conditions of fiefs differently regulated in the original grants thereof. The persons who possess these sorts of lands and tenements are called persons of a servile condition, and the lands which are held on this condition return to the lord, whenever the case happens, as being a kind of succession which falls to him by the death of the possessor, and which might be called a reversion by covenant.[a]

XVI. *The Use of these last Remarks on the different Kinds of Successions.*

2459. Of all these sorts of successions aforementioned, which transmit estates to the king, or to the lord of the manor, there is not one which comes regularly within the design of this book, as has been already observed. For they are matters which either belong to the public law, or to the customs. But although these kinds of successions come not properly within the design of this book, yet it was necessary to make these general remarks concerning them, in order, not only to give an idea of all that may be comprehended under the word *succession*,[a] and to distinguish what relates to the successions which we are to treat of in this second part from all that may have any relation to them, but more especially to inform the reader, that even in those kinds of successions which are either part of the public law, or peculiar to the customs, the rules of succession which shall be explained in this second part may be applied to them in the cases where there is any resemblance; such as the rules which concern in general the quality of the heir, the rights and burdens of heirs, their engagements, and other rules which it will be easy to discover if they can be of any use in those other kinds of successions, although no mention be made thereof in the places where they shall be explained.

[a] See the end of the preamble of the fourth section of *Heirs and Executors* in general.

[a] We have not comprehended under the word *succession* the *peculium*, or small patrimony, which some professed monks may leave behind them at their death. For seeing they themselves had no right of property therein, it is not by succession that that little patrimony which they leave behind them passes to the persons who are to have it.

BOOK I.

OF SUCCESSIONS IN GENERAL.

2460. *Matters treated of in this Book.* — It is not necessary to explain here what are all the particular matters treated of in this first book. This appears sufficiently from the table, and from the plan of the several matters which has been laid down in the *Treatise of Laws.*[a] And it sufficeth to remark in general, that, as there are some matters common to both kinds of successions, the legal and testamentary, it is of these common matters that we are to treat in this first book, before we pass to the matters which are peculiar to each kind of succession.

TITLE I.

OF HEIRS AND EXECUTORS IN GENERAL.

2461. The name and quality of heir agree equally to the heir at law or next of kin, that is, the person whom the law calls to the succession, and to the heir instituted by testament, in the same manner as the words *succession* and *inheritance* are common to the two kinds of succession, that by testament and that of intestates. And although there be this difference between the provinces of France which are governed by their customs, and those which are governed by the written law, that in the customs they give the name of heir, as has been observed in the preface to this second part,[a] only to the heirs of blood, who are the heirs at law, and give

[a] See the fourteenth chapter, no. 14, 15, 16, of the *Treatise of Laws.*

[a] See the preface, no. 7.

the name only of universal legatees to those who are instituted heirs by a testament; whereas, in the provinces which are governed by the written law, they give the name of heir to him who is instituted by testament, as well as to him who is heir of blood: this difference consisting only in the name, they are all of them equally considered as heirs, and we may apply to the universal legatees in the customs, as well as to all the other sorts of heirs, the rules which shall be explained in this title, and likewise the rules contained in the other titles, in so far as the said rules may be applicable to them. As to the detail of this first title of *Heirs and Executors* in general, the table of the sections which compose it shows plainly enough what are the matters to be treated of in it.

SECTION I.

OF THE QUALITY OF HEIR OR EXECUTOR, AND OF THE INHERITANCE.

2462. ALL the articles of this section agree both to the heirs by testament and to the heirs at law.

ARTICLE I.

2463. *Definition of Heir.* — The heir or executor is he who is universal successor to all the goods and all the rights of the deceased, and who is bound to acquit all the charges and burdens of the said goods.[a]

II.

2464. *Two Sorts of Heirs.* — There are two sorts of heirs: those who are instituted, that is to say, who are named by a testament, who are called testamentary heirs; and those to whom the law gives the inheritance on account of their proximity in blood, who are called, for that reason, heirs at law. And they are called like-

[a] *L.* 9, § 12, *D. de hæred. inst.*; — *l.* 37, *D. de acquir. vel om. hæred.*; — *l.* 2, *C. de hær act.* As to these words, of *all the goods and all the rights of the deceased*, see the fifth article. And concerning the charges, see the seventh article.

We have put down in the definition what is said in the second of these texts, that the heir succeeds to all the goods and to all the rights, although there may happen to be legatees who have a share of the goods; for the heir is the universal successor, and the legacies are a part of the charges which he is to acquit.

wise heirs to intestates, because they succeed if they are not excluded by a testament.[b]

III.

2465. *Definition of Succession.* — By succession, or inheritance, is meant the mass or stock of goods, of rights, and of charges which one leaves behind him after his death, whether it be that the goods exceed the charges, or that the charges surpass the goods.[c] And we give likewise the name of succession, or inheritance, to the right which the heir or executor has to gather in the effects, and exercise the rights belonging to the deceased, such as they shall happen to be.[d]

IV.

2466. *Two Sorts of Successions.* — There are two sorts of successions, as well as two sorts of heirs, as has been mentioned in the second article. One is called the legal succession, or succession of intestates, which the law gives; and the other is the testamentary succession.[e] The word *succession* here is to be taken in the sense explained at the end of the third article.

V.

2467. *All the Goods of the Deceased are not always Part of the Inheritance.* — The inheritance comprehends only the goods and rights which are transmissible to a successor. For it may happen that the deceased was in possession of some which he had not power to leave to his heirs; and those are no part of the inheritance. Thus, the rights annexed to the person, and which are extinct by death, such as a pension for life, a usufruct, a personal privilege, are never reckoned part of the succession. Thus, there are offices which are lost by the death of the officer, and do not pass to his heirs. Thus, goods which are subject to a substitution do not remain in the inheritance of him who is charged to restore them at his death.[f]

[b] § *ult. in fin. Inst. per quas pers. cuique acquir.*

[c] *L.* 50, *D. de petit. hær.*; — *l.* 3, *D. de bon. possess.*

[d] *L.* 62, *D. de reg. jur.*; — *l.* 24, *D. de verb. sign.*; — *l.* 3, § 2, *D. de bon. poss.* See the fifth article, on these words, *leaves after his death.*

[e] See the text quoted on the second article. These two sorts of successions are the subject-matter of the second and third books.

[f] *L.* 3, § *ult. D. quib. mod. usufr. amitt.*; — *l.* 3, *C. de usufr.* We shall explain what is meant by substitution, in the fifth book.

VI.

2468. *An Inheritance may be without any Goods.* — Seeing an inheritance consists in goods and rights, subject to debts and to other charges, and that it may so fall out either that the debts and charges exceed the goods, or that the goods, if there remain any after all the charges are cleared, are diminished, or even quite destroyed; this word *inheritance* is only a term of law, that is to say, which does not denote any sort of goods in particular, but which signifies in general the right which the heir has, and which is applicable as well to a succession that is overburdened with debts and other charges, as to a plentiful succession, where there is a residue of goods after all the charges are acquitted. Thus, the heir may chance to have only the bare name, without any profit, and sometimes even with loss.[g]

VII.

2469. *Three Sorts of Charges in a Succession.* — The charges of the succession are of three sorts. The first is of those which are due independently of the will of the deceased; such as the debts which he owes, the restitution of goods which are substituted, if he had any such in his possession. The second sort consists of those which he himself may have directed, such as legacies. And the third sort is made up of those which may happen after his death, such as the funeral charges.[h]

VIII.

2470. *The Heir or Executor is in the Place of the Deceased.* — The heir or executor succeeding to the estate, and to the burdens of it, he puts himself in the place of the deceased, and his condition is the same as if he had covenanted with him, that, on condition he would leave him his goods after his death, he should be obliged to pay his debts and to acquit the other charges, and as if he had expressly bound himself to those persons to whom he may be under engagements, by virtue of this quality of heir or executor. Thus, the condition of the heir or executor is, in one sense, the same with that of the deceased, in that he has all the same goods, and the same rights, and that he is obliged to bear

[g] *L.* 119, *D. de verb. signif.*; — *l.* 178, § 1, *eod.*

[h] These different sorts of charges shall be explained each in its proper place. See the sixth and following sections.

the charges of them, in so far as the said goods and rights may pass to him, as has been explained in the fifth article.[i]

IX.

2471. *Three Characters of the Engagement of the Heir.* — This engagement, which obliges the heir or executor to all the charges and to all the consequences of the inheritance, has three essential characters, which it is necessary to remark and to distinguish. It is irrevocable, it is universal, it is indivisible: and these three qualities have the effects which shall be explained in the following rules.[l]

X.

2472. *This Engagement is Irrevocable.* — The engagement of the heir is irrevocable, and he who, being of age, once takes upon himself the quality of heir shall be always heir, and can never, upon any pretence whatsoever, divest himself of that character, or free himself from the engagements which attend it; not even although the goods should be less than the charges, nor under pretext of the loss and diminution of the effective goods, nor of the charges that were, perhaps, unknown to him. For he ought to have foreseen these events; and he may be charged with having found in the succession goods which he has concealed,[m] unless he had taken the precaution to accept the inheritance under the benefit of an inventory, of which we shall speak more fully under the second title.

XI.

2473. *It is Universal.* — The engagement of the heir is universal, and extends itself to all the debts owing by the deceased, and

[i] *L.* 3, § *ult. D. quib. ex caus. in poss. eatur*; — § 5, *in f. Inst. de obl. quæ quasi ex contr. nasc.*; — *l.* 59, *D. de reg. jur.*; — *l.* 120, *eod.* The engagement of the heir cannot be looked upon as a kind of contract, as it is called in these texts, without supposing that he has engaged himself to some person. Which may be applied to an engagement towards the deceased, by a retroactive effect, or towards his memory, and to an engagement towards the creditors and legatees. See, concerning the engagement towards the deceased, the fourteenth article.

We call that a retroactive effect, which makes a thing that has happened after another to be considered in such a manner as to give it the same effect as if the last thing had happened at the same time with the first.

[l] This is a consequence of the preceding articles, and of those which follow.

[m] *L.* 7, § 10, *in f. D. de minor.*; — *l.* 8, *D. de acquir. vel omit. hæred.*; — *l.* 4, *C. de repud. hæred.* See the seventeenth article. We have added in the article these words, *who being of age*, that we might not comprehend minors within this rule; as to which, see the tenth and following articles of the second section of *Rescissions*.

to all the kinds of obligations to which the deceased was a party, and which might affect his estate. As if he was under any engagement on account of things which he had sold, bought, exchanged, hired, or let to hire, or other covenants; if he was engaged in any tutorship, or other administration; if he was surety for other persons; if he had succeeded to some inheritance. And in general, the heir or executor, who has taken upon him that character, has obliged himself indefinitely to all the charges which the deceased owed, and likewise to those which the deceased may have imposed upon him by a testament, or other disposition. For by succeeding to all the goods of the inheritance, he subjects himself to all the charges without distinction.[n]

XII.

2474. *It is Indivisible.* — The engagement of the heir is indivisible, for he cannot confine his acceptance of the succession either to any certain kind of goods, or to a certain portion of goods of the same kind, so as to diminish the charges in proportion. And even although it were a testamentary heir, instituted for two different portions of the inheritance, one of which should be left him on conditions which he should agree to, and the other portion left on conditions which he should not approve of, yet he could not renounce the one and accept the other. And much less can the heir, having once accepted the inheritance, divide the charges thereof, in order to free himself either from some of them, or from a part of each of them, under pretext that there are not goods sufficient to acquit all the charges, or even that the whole goods and the whole rights of the succession are entirely perished.[o]

XIII.

2475. *The Inheritance is divided among the Coheirs.* — Although the quality of heir be indivisible in the sense explained in the fore-

[n] *L.* 62, *D. de reg. jur.*; — *l.* 2, *C. de hæred. act.* See the sixteenth article.

[o] *Ll.* 1 *et* 2, *D. de acq. vel omitt. hæred.*; — *l.* 20, *C. de jur. delib.*; — *l.* 10, *D. de acq vel omitt. hæred.* The rule explained in this article is not contrary to that rule of the customs, by which the succession of one who leaves behind him goods paternal and goods maternal ought to be divided; and the relations of the father's side, who succeed to the paternal goods, are not bound for the debts and charges which ought to be acquitted out of the maternal goods; as, on the contrary, the heirs of the mother's side who succeed to the maternal goods are not answerable for the debts and charges which respect only the paternal goods. For these two kinds of goods are considered as two different successions which go to different heirs.

going article, yet the goods and charges of the inheritance, which one sole heir cannot divide in order to free himself of a part of them, may nevertheless be divided among the heirs, when there are more than one, according to the portions which may belong to each of them, whether the same be regulated by the law, as if they are heirs to an intestate, who are called jointly to the succession, or by a testament, if they are testamentary heirs. And they may likewise in their partitions divide among themselves the goods and the charges in what manner they please, as shall be explained hereafter in the proper place.[p]

XIV.

2476. *The Succession not as yet entered to represent the Deceased.* — Since it often falls out that the inheritance remains for some time without a master, either because he who ought to succeed is absent, or that he deliberates whether he shall accept or renounce the inheritance, and that, during these intervals, it may happen that some right may accrue to the succession, or that it may be engaged in new charges, or other affairs, the said inheritance is therefore considered as holding the place of master, and as representing the deceased to whom the goods did belong.[q]

XV.

2477. *The Heir is reputed such from the Moment of the Death of the Person to whom he succeeds.* — After the inheritance which had lain some time without a master is accepted by the heir, his acceptance of, or entry to, the inheritance has this retroactive effect, that it makes him to be considered in the same manner as if he had entered to the succession in the moment that it fell to him by the death of the person to whom he succeeds. And whatever space of time there may have been between the said death and the act by which he takes upon himself the quality of heir, it will be the same thing as if he had declared his acceptance at the time of the death: and as he will have all the goods which may have augmented the succession, so he will be also bound for all the charges that have fallen out since the death of the person to whom he succeeds.[r]

[p] See the ninth section of this title, and the first section of *Partitions*.

[q] *L.* 116, § 3, *D. de legat* 1; — *l.* 31, *in f. D. de hæred. instit.*

[r] *L.* 54, *D. de acq. vel omitt. hæred.*; — *l.* 193, *D de reg. jur.*; — *l.* 138, *D. eod.* See the third section of the sixth article. We have not explained in this article what is meant by the word *retroactive*, having already explained it in the remark on the eighth article.

XVI.

2478. *Several Successions of one Heir to another pass all of them to the last Heir.* — It follows from the preceding rules, that, the heir being universal successor to all the goods, and bound irrevocably and without distinction for all the charges, if the person to whom he succeeds had likewise succeeded to others, the goods and chattels which remain of the successions which the deceased had inherited pass to his heir. And whatever number of heirs there may have been successively one to the other, whether by testament or without testament, he who succeeds to the last of the said heirs succeeds to all the others, and will be liable for all the charges of those successions,[s] although in the last successions there should be no goods belonging to any of the former; for the charges of each succession are transmitted from one heir to the other: thus the last heir takes them all upon himself.

XVII.

2479. *The Heir who divests himself of the Inheritance is nevertheless bound for all the Charges.* — It follows, also, from the same rules, that he who has once entered to an inheritance, or done any act which may be construed as taking upon him the quality of heir, according to the rules which shall be explained in the first section of the third title, shall remain always heir; and although he should afterwards divest himself of the inheritance, whether it be by making it over to another by a deed of gift or by sale, or by leaving it to the person who next to him had the right to succeed, or by abandoning it, or disposing of it otherwise in any manner whatsoever, he will, nevertheless, be always accounted as heir, and be liable for all the charges. For the engagement by which he took upon himself the quality of heir is irrevocable. But he may be warranted against all the burdens of the succession by the person to whom he shall have sold, given, or yielded up his right.[t]

XVIII.

2480. *He who receives a Sum of Money to abstain from the Succession is reputed Heir.* — We may place in the same rank with

[s] *L.* 7, § 2, *D. de acq. vel omitt. hæred.*; — *l.* 3, *D. de hæred. petit.*; — *l.* 194, *D. de reg. jur.*; — *l. ult. C. de hæred. instit.*; — *l.* 65, *D. de verb. signif.*

[t] *L.* 2, *C. de legat.*; — *l.* 7, *in f. D. de minor.* See the following article, and the eighth, ninth, and tenth articles of the first section of the third title.

the heir who, having once accepted the succession, does afterwards dispose of it, him who renounces it for a certain price, that it may go to the person who next to him has the right to succeed. For although he may seem not to be heir, having renounced the succession, yet he really and truly sells his right of inheritance, which no one can do but as being heir. In the same manner as every one who sells any other thing declares himself to be master of it, and by divesting himself of it he exercises a right of proprietor. Thus, the heir who for a certain price renounces the succession remains still heir with respect to the creditors and legatees, although he loses the rights appertaining to that quality with respect to him to whom he has made them over.[u]

XIX.

2481. *The Succession of Intestates does not take place, if there is a Testament which subsists.* — When the question is to know to whom the succession of a person deceased doth appertain, we must always first inquire whether he has disposed of it by will. For whether the testator have children or not, he may make dispositions which change the order of the succession of intestates, and which ought to be executed. So that, in order to know who has the right to the goods, we must always begin with the testaments.[x]

XX.

2482. *If the Portions of the Heirs are not regulated, they will be equal.* — If there are several testamentary heirs, whose portions of the inheritance are not regulated by the testament, or several heirs to one dying intestate, and the law has not determined the shares which every one ought to have, they shall be equal. For it being necessary to divide the inheritance, and there being no reason for an inequality in the partition, the heirs ought all of them to have as much the one as the other.[y]

[u] *L.* 2, *D. si quis om. caus. test.*; — *l.* 1, *C. si omissa sit caus. testam.* See the ninth article of the first section of the third title.

[x] *L.* 39, *D. de acquir. vel om. hær.*; — *l.* 70, *eod.* The rule explained in this article has nothing in it contrary to what has been said in the preface, no. 8, touching the question, which of the two sorts of succession is most favorable, whether that of the heirs by testament, or that of the heirs of blood; for here we speak only of cases where the testament ought to have its effect.

[y] *L.* 9, § 12, *D. de hæred. instit.* We have said in this article, with respect to the heirs of one dying intestate, that their portions shall be equal if the law does not regulate them.

SECTION II.

WHO MAY BE HEIR OR EXECUTOR, AND WHO ARE THE PERSONS INCAPABLE OF THAT QUALITY.

2483. In order to know who may be heir or executor, it is necessary to know who are the persons incapable of this quality; for these being excepted, all others are capable of it. There are two sorts of persons who cannot be heirs or executors, those who are incapable of this quality, and those who have rendered themselves unworthy of it. We shall explain in this section the causes which render persons incapable of succeeding, and in the following section those which render persons unworthy of it. The incapacities of succeeding may respect both the successions of *intestates*, and the testamentary successions: and it will be easy to perceive in each article the effect of the incapacity with regard to these two sorts of succession.

2484. It is to be observed, touching the causes which render persons incapable of succeeding, that, besides those which shall be explained in this section, there is one which is received in some customs of France, which exclude the daughter, who is married by her father, and even without giving her any portion, not only from the succession of her father, but from all other successions of intestates, both in the direct and collateral line, when there are male children, or issue of male children. And by a universal usage, this exclusion hath been extended to daughters who, being married and endowed by their father, renounce all successions that may fall to them by the death of any one dying intestate, in favor of the male issue, which begets an incapacity, or rather an exclusion by agreement from the said successions, founded on the regard that is shown to the male issue, in order to preserve the estates in the families; the daughters who are married finding in the family of their husbands the same advantages which they leave to their brothers and their descendants when they go out of

For it may happen among coheirs to one dying intestate, that their portions are not equal because of the right of representation. Thus, for example, if there are several children of a son deceased, who divide with their uncle the succession of their grandfather, they will have no more among them all than the moiety which their father would have had, and the other moiety will go to their uncle. And it happens often in the customs of France, that there are different heirs to different goods.

their own family. And this usage is justified by the example of the divine law, which excluded the daughters from the inheritance of their fathers, as long as there was any of the male issue alive.[a] We may consider likewise as another reason for this usage of the exclusion of daughters, who by their marriages renounce their right to all legal successions in favor of the males, and of their descendants, the uncertainty of events, which makes it to be thought reasonable that the father, in giving to his daughter a marriage portion, may lawfully impose on her this condition, that the portion which he gives her in hand and at present shall be to her in lieu of the uncertain hopes of all intestate successions that might hereafter fall to her. But this exclusion doth not extend to testamentary dispositions; and this renunciation of a married daughter does not render her incapable of dispositions made in prospect of death for her benefit, whether it be by other persons, or even by her father.

2485. Seeing this exclusion of daughters by a renunciation in their contract of marriage is not a part of the Roman law, but is directly contrary to it,[b] it is not a matter that comes properly within the design of this book; but we have thought fit to make this remark upon it. And we may add, that the reader shall have here all the rules that are essential to the matter of this renunciation; for they depend on the rules of covenants, and on those of successions, which are here explained: and we shall likewise insert here the rules which concern institutions by contract, pursuant to the remark which has been made on this subject in the preface, no. 10.

2486. Lastly, it may be remarked on this subject of the incapacity of succeeding, that, besides that of the daughters who have renounced their right to all intestate successions, there is another sort of incapacity introduced by the ordinances and some other customs of France, with respect to testamentary successions, from which they exclude certain persons. Thus, the ordinances of France annul all deeds of gift, or testamentary dispositions, made by donors or testators, in favor of their tutors, curators, and other administrators during their administration, or to other persons for their behoof;[c] which some customs extend to other persons, from whom the donors or testators may receive such impressions as may

[a] *Numb.* xxvii.
[b] *L. ult. D. de suis; — l.* 3, *C. de collat.*
[c] Ordinances of 1539, art. 131, and of 1549, art. 2.

diminish the liberty of disposing. Thus, upon the like considerations, or upon other views, some customs exclude the husband and the wife from receiving any benefit by dispositions made in favor one of another: which some customs restrain to the dispositions made by the wife in favor of her husband, not prohibiting those of the husband in favor of the wife.[d] But there is this difference between these incapacities or exclusions regulated by the ordinances and by the customs, and the incapacities treated of in this section, that these are founded on qualities which respect the state of the persons, and render them incapable by reason of some personal defect, whereas the others are founded on motives which have no relation either to the state of the persons or to any defect; but which respect only some advantage for the good of families.

ART. I.

2487. *All Persons may be Heirs or Executors, if there is no Impediment.* — All persons may be heirs, whether it be to intestates, if the law calls them to the succession, or that they be named by a testament; provided there be no cause which excludes them from the right of succeeding.[a]

II.

2488. *Two Sorts of Incapacity, with Respect to the Two Sorts of Succession.* — There are some persons who are incapable only of succeeding to intestates, and who are capable of testamentary successions, such as bastards. And there are some who are incapable of both kinds of succession, such as foreigners, who are called aliens, and others; of which we shall speak hereafter.[b]

III.

2489. *Two Sorts of Incapacity, with Respect to their Causes.* — The causes of incapacity of succeeding are of two sorts. There are some causes which are natural, such as the cause of the incapacity of stillborn children; and there are others regulated by the laws, such as that of the incapacity of professed monks.[c]

[d] By the Roman law the husband and wife were allowed to give to one another by donations made in prospect of death, but not by donations that should take effect in their lifetime. *V. l.* 1, *D. de donat. int. vir. et ux.*; — *l.* 32, *eod.*; — *d. l.* 1, §§ 2 *et* 3. See the preamble to the title of *Donations*.

[a] Capacity arises from thence, that there is no incapacity.

[b] See the eighth, ninth, tenth, and eleventh articles.

[c] See the following article, and article 10.

IV.

2490. *Of Stillborn Children, and of those born without Human Shape.* — Stillborn children, although they were alive in their mother's womb at the time that any succession fell, whether it be of one dying intestate, or of one who had made a testament that might belong to them, do not succeed; and consequently they do not transmit that succession to the persons who would succeed to them, if they had died only after their birth. For they could never be reckoned in the number of persons capable of acquiring goods; since it may be said, that they never had any existence in this world, and by consequence could never have right to any thing in it.[d] And the same incapacity excludes, with much greater reason, that which is born of a woman without human shape, although it may have had life; for it is a monster, or a mass of flesh, which cannot be ranked in the number of persons.[e]

V.

2491. *Children who die as soon as they are born succeed.* — Children who are born alive, although they die immediately after their birth, are capable of the successions which fell in the interval between their conception and their birth. Thus, a child who was born alive after the death of his father, and who died in the moment after his birth, would succeed to him. And if there was a testament which had called another person to the succession, it would be annulled by the said birth.[f]

REMARKS ON THE PRECEDING ARTICLE.

2492. *Whether a Child born before its Time, but born alive, can inherit.* — From the rule explained in this article, and the laws here cited, there naturally arises a question, which, being of frequent use, deserves our consideration; that is, whether among the children capable of succeeding we ought to reckon those who, being born before their time, cannot live, and are born for no other end but to die. This question is never moved on account of the

[d] *L.* 129, *D. de verb. signif.*; — *l.* 2, *C. de post. hæred. inst.* See the following article.

[e] *L.* 14, *D. de stat. hom.*; — *v. l.* 135, *D. de verb. signif.* See the fourth article of the first section of *Persons*, and these last words of the third law, *C. de post. hæred. inst.*, cited on the following article, *si vivus ad orbem totus processit, ad nullum declinans monstrum vel prodigium.*

[f] *L.* 2, *C. de post. hæred. instit.*; — *l.* 12, § 1, *D. de lib. et post. hæred. inst.*; — *l.* 3, *C. de post. hæred. inst.*

interest of the children themselves, but because of the concern which other persons have in it. Thus, for example, if a widow, being with child, is delivered after the death of her husband of a child of four or five months old, which dies as soon as it is born, the question will be between this widow, who will demand that which the law gives her of her child's paternal goods, alleging, that her child succeeded to its father; and the heirs of the father, who will pretend that the child, not having been able to live, was not capable of succeeding; in which question it will be necessary to determine whether the child did succeed to its father, or not. And it would be the same thing with respect to the maternal goods of the child, if, the child having survived its mother, who died in childbed, the father should demand, in opposition to the heirs of the mother, that which he ought to have of the maternal goods of the said child.

2493. In this question, the heirs of the father, or those of the mother, would say in one word, that seeing this child could not live, it could not succeed; that being incapable of using or standing in need of any temporal goods, it is incapable of acquiring any, and consequently of having any share in a succession. And the father and mother would say, on the contrary, that if the child is born alive, it is a sufficient reason why it should be counted in the number of children; that the birth of any person places him in the world in the rank of men, who are really and truly children of those from whom they derive their birth; that the birth of this child, and the care and pains taken about it, both before and at its birth, have been as chargeable to the parents as the birth of any other child; so that its death is to them a real loss of a child, more grievous in one sense than the death of their other children, and which requires the same consolation which they would have at the death of any of their other children, by succeeding to them, which cannot be unless the child be allowed to have a right of succeeding, that it may leave to its father, or to its mother, that portion which the law has allotted to the parents of the goods of their children. That the law gives the right of succession to all the children without distinction, and excludes none from that number, except those who, being born without human shape, cannot be placed in the rank of persons.[a] That although the said children can make but little use of the goods, yet their condition

[a] *L.* 14, *D. de stat. hom.* See the preceding article.

in this respect does not differ from the condition of those children who, being born in due time, are nevertheless incapable of living, and who die as soon as they are born, whether it be that their death is occasioned by the hard labor of their mother, or by some infirmity, or for the want of a just conformation of their members, or by some other cause, which, although it makes it impossible for them to live, and renders the goods in a manner useless to them, yet it does not for all that make them incapable of successions; that although the little occasion which children born before their time may have for the use of the goods expires in a few days, or even in a few hours, yet it may be said, and not without ground, that they stand in need of them both before their birth, and even after they are born, if they live any time, and that it is out of the goods which belong to them that what they stand in need of ought to be taken; that it is in consideration of all children without distinction before their birth, that the law allots to widows who are with child, and even to those who have estates of their own, a provision out of the estate of their deceased husbands, during their being with child, for the preservation of the child;[b] and that curators are assigned to the children who are yet unborn, in order to take care of the goods which wait for them,[c] because they are heirs before they are born, and that, with respect to the acquiring of goods which may belong to them, the law considers them as if they were already born;[d] that the successions of the father or mother of the said children ought not to remain in suspense after their birth; and that seeing they did already belong to them before they came into the world, upon this condition only that they should be born alive, and that during the time they remain in this life these successions can belong to no other person but to them, it seems just that, adding to these considerations the great favor which attends the cause of fathers or mothers who survive their children, we should look upon these successions as being acquired to the children, both on account of the right which the children had to them even before they were born, and likewise in consideration of the natural motive which induced our lawgivers to give to the father or mother the consolation not to lose at the same time their children, and also their effects;[e] and likewise

[b] See the eighth article of the second section, *In what Manner Children succeed.*

[c] See the seventh article of the said second section, *In what Manner Children succeed.*

[d] *Ll.* 7, 26, *D. de stat. hom.*;—*l.* 7, *D. de suis et legit.*;—*l.* 1, *D. de vent. in poss. mit.*

[e] *L.* 6, *D. de jur. dot.*

for this reason, that the succession of the father or mother of this child cannot, during its life, go to any other person but to the child, and that it likewise cannot be one moment without belonging to somebody or other. That the laws quoted on this article require nothing more for making children capable of succeeding, but only that they may have one moment of life at their birth. That the first of the said laws opposes to the stillborn child which does not succeed the child that dies immediately after its birth, and declares it capable of succeeding, whereas the stillborn child is incapable thereof. That the second law requires only that the child should have a human shape, and be born alive, *integrum animal cum spiritu.* That, as for the third law, it appears that Justinian has there decided a question that was between two parties of lawyers, the one pretending that the child which had given any sign of life at its birth, although it did not cry after the usual manner of children, might succeed; and the other being of opinion that crying was necessary in order to prove that the child had life; which, in all appearance, was founded on the uncertainty of all the other signs of life. Thus, it would seem that the question between those lawyers was not whether a child born before its time, although born alive, was capable of succeeding, but only whether we could judge of the child's being born alive by any other tokens than that of its crying; which seems, in a manner, to prove that both parties agreed that a child, although born before its time, might succeed if it had lived. And likewise, in this dispute, Justinian does not decide that children come to their full time, and born alive, should succeed, and that those born before their time should not succeed, although they should be alive at their birth, which he ought to have decreed if that had been the question; but he only decides in general, and indefinitely, that children who are born alive may succeed, although they die immediately after their birth. That it is true that this law is expressed in these terms, *si vivus perfecte natus est;* but whether the word *perfecte* relates to the preceding word *vivus*, or to the word *natus*, which follows, and whether the expression signifies either perfectly born or perfectly alive, it cannot be gathered from either of these two meanings, that the words of the law are to be understood only of a child born at its full time; since a child born before its time may be born in such a manner as that there can be no room for doubting of the child's being perfectly alive, or of its being perfectly born, that is to say, of its being separated from the bowels of its

mother, either by a natural and ordinary birth, or by opening the mother's body after her death. And the words which follow seem to explain the law in this manner, since they make the only question to be to know whether the child is perfectly born, and whether it is a child, and not a monster, *hoc tantummodo requirendo, si vivus ad orbem totus processit, ad nullum declinans monstrum vel prodigium.* That if we should give to this law the effect to exclude all children who, by reason of their being born before their time, cannot live, we should be obliged likewise to exclude from successions children born in the eighth month, who, according to the general opinion, cannot live. That even the laws which speak of children not come to their full time consider in them this defect only when the question is concerning the state of the children, and to know if they are lawfully begotten or no; whether it be that they are born too soon after the marriage, or too late after the husband's death. It is true that this question regards also the right of succession, for children who are not legitimate cannot inherit; but there is not any one of those laws which considers in the children the capacity or incapacity of living, in order to exclude those from inheriting who, by reason of their being born before their time, are incapable of living. It is in reference to this question concerning the state of these children that it is said in one law, that a child born in the seventh month after the marriage is the lawful child of the husband;[f] that it is said in another law, that a child born after the tenth month from the death of the husband does not succeed to him, the law judging that he has another father; and it is there added, that a child born in the hundredth fourscore and second day is born at its full time; and that if a woman slave, being made free, happens afterwards to be brought to bed on the hundredth fourscore and second day after her freedom, her child shall have been conceived free.[g] Thus, all that is contained in those laws, which has any relation to the capacity or incapacity of these children to inherit, concerns only their state and their quality of legitimacy, without taking it into consideration whether they may or may not live. There is another text, which, although it is not in the body of the law, is, nevertheless, of some authority, because it is in the works of the lawyer Paulus, one of the first authors of the Roman laws, in which it is said that a child of seven months is counted in the number of children, and is of ad-

[f] *L.* 12, *D. de stat. hom.*

[g] *L.* 3, § *pen. et ult. D. de suis et legit. hæred.*

vantage to its mother.[h] From whence it follows, that a child born before that time is of no benefit to her. But this is only in relation to the ancient Roman law, which gave the mother right to succeed to her children only when she had three of them. So that this rule, any more than the others already mentioned, had no relation to the capacity or incapacity of these children for successions, and it served only to exclude the children born before the seventh month from being of the number of children necessary to entitle the mother to this right of inheritance; which was founded on this reason, that the law which required that the mother should have three children to entitle her to this right had in view the advantage which accrued to the commonwealth by the multiplication of children, and considered that those who could not live were of no advantage in that respect. That, in fine, if children which are born before their time are incapable of inheriting, there will arise a great many inconveniences from the difficulty of judging of the time of the conception of a child, in order to know whether it is born at its full time or not; and likewise from the uncertainty that may be even in the rule itself, concerning the time necessary for a child's being born at the full term, as we shall observe in the proper place.[i]

2494. As to this question, which is of so great importance, because of its consequences in the cases where it falls out, it would seem that from all the foregoing remarks we might conclude that, if it were to be decided by the laws which have been quoted, every child that lives one moment after its birth is capable of inheriting, whether it is born at its full time or before. And we see, likewise, that it has been adjudged that children born in the fifth or sixth month, which, according to the rule, is before the due time, having lived for some moments, have inherited. And although there may be other examples, where it has been decided, on the contrary, that children born within the same time have not succeeded, yet this may have happened in cases where there was no certain proof that the child was alive. And we see in the author of the greatest renown among those who have collected the decrees of the parliaments in France, that he reports one[l] which confirms this conjecture. It was in the case of a child of

[h] *Paul. sent.* 4, *tit.* 9.

[i] See the fifth article of the first section, *In what Manner Children succeed*, and the remark which is there made.

[l] *Loüet, letter E, no.* 5.

four or five months, taken out of the womb of its mother after her death, and which, as the father pretended, was alive; the heirs of the mother alleging, to the contrary, that the said child had given no manner of sign of life; so that the dispute between the parties was only about the fact, to know whether the child had lived or not. Upon which it was adjudged that the child was stillborn; which seems to imply that, if it had been certain that the child was born alive, it would have succeeded. For seeing this child was born before its time, if it had been adjudged for that reason, that, although it had been born alive, it could not have succeeded, it would not have been pronounced that it was stillborn; because the fact concerning its life or its death would have been indifferent and useless as to what concerned the succession. And also another author,[m] reporting a decree of parliament, by which it was adjudged that a child of five or six months, being born alive, had inherited, says that it was decided that the seven months which the laws require for the term of a lawful birth ought not to be understood, as has been already observed, except in reference to the question about the state of the child, to know whether it is legitimate or not, *cum agitur de statu, et fit quæstio status;* and have no relation to the question about knowing whether the child has succeeded, in order to transmit the succession, *non cum agitur de transmissione hæreditatis;* these are the words of that author. Thus, it would seem by these decrees that they did not take it for a rule, that the child which is born before its time, not being capable of living, is incapable of succeeding; and that they have, on the contrary, taken it for a rule, that the child which is born alive, although it be before the time necessary for its being capable to live, does, nevertheless, succeed; provided that the proofs of life be perfect, and that they do not take for proofs of the life of a child some appearances of motions of the members, which may happen even to those which are born dead, and which are commonly the only signs of life that appear in children which are born so long before their time, as it happened in the case of the first of these two decrees, as the author has there observed, in reporting the reasons insisted upon by both the parties. It was, without doubt, the uncertainty of such like marks of life in these children that induced the lawyers before mentioned to require, for a proof of the life of the child, that it was heard to cry.

[m] *Bouguier, letter C, no.* 4.

VI.

2495. *A Child born after the Mother's Death.* — We must reckon in the number of children capable of inheriting the child that is taken out of its mother's womb after her death, although it had lived only a few moments. For although the child was not born when the mother's succession was open, yet the operation by which it is brought into the world stands in place of its birth; and it is enough that the child hath survived its mother.[g] And we may even say that it succeeded to its mother before its birth.

VII.

2496. *Persons who are Mad, Deaf and Dumb, and Prodigals, may inherit.* — Those who are born deaf and dumb, or with other infirmities which render persons incapable of the management of their estates, are nevertheless capable of inheriting, as well as the other children. And even those who are mad acquire the successions which fall to them, as well as prodigals who are interdicted. But all these sorts of persons have curators assigned them, who take care of their estates, as tutors do of those belonging to minors. And although these qualities render them incapable of binding themselves, and the quality of heir may contain some engagements, yet their tutors and guardians contract for them. But always upon this condition, that, if the successions are burdensome to them, they may renounce them, and be relieved from the said engagements.[h]

[g] *L.* 12, *D. de liber. et post. hæred. inst.*; — *l.* 6, *D. de inoff. test.*; — *v. l.* 132, *et l.* 141, *D. de verb. signif.* What is added in the article, that a child may be said to have succeeded to its mother before its birth, is founded on this, that the laws consider the children which are in their mother's womb as if they were really born, when it concerns matters that are for their advantage, or successions which may belong to them. See the laws cited under the letter *d*, in the remark on the foregoing article.

[h] *V. tit. D. de bon. poss. furioso in f. muto, surdo, cæco compet.*; — § 4, *in f. Inst. de hæred. qual. et diff.*; — *l.* 1, § 2, *D. de hæred. instit.*; — *l.* 5, *D. de acquir. vel omitt. hæred.*; — *d. l.* 5, § 1, *D. de acquir. vel omit. hæred.* All these sorts of persons are capable of having goods of their own, and it is only because of this capacity that they have tutors and curators assigned them. And as to the engagements which attend the quality of heir, they enter no farther into them than to the value of the goods of the succession. For when a succession falls to them, there is an inventory made of all the goods, in order to charge the tutor or guardian therewith. Thus, the creditors have the same security in this case as they have against those heirs who are of age, and who take upon them the quality of heir only with the benefit of an inventory; which shall be the subject-matter of the ensuing title. See the eleventh, twelfth, and thirteenth articles of the fifth section of *Persons*.

VIII.

2497. *Bastards do not succeed to Intestates.* — Bastards are incapable of succeeding to intestates, unless it be to their own children, if they have any lawfully begotten; and they do not so much as succeed to their own mothers. For they do not reckon in families any persons in the number of relations who are capable of inheriting, except such as are placed in that rank by their being born in lawful wedlock. And as bastards cannot succeed to any who die intestate, so likewise nobody can succeed to them when they die intestate, except their own lawful children, not even their mothers.[i] But they are capable of receiving by a deed of gift or a testament, and they have power to dispose of their own estates by will.

Remarks on the Preceding Article.

2498. It is said towards the close of the article, that bastards are capable of acquiring by deed of gift or by testament, and that they may dispose of their own goods; concerning which it is necessary to observe, that, as to the dispositions which they may make of their goods, their condition is the same with that of other persons, and they have the same liberty therein. But as for the bounties which may be given to them, the Roman law, the customs of France, and usage have set some bounds thereto.

2499. As for the Roman law, the emperors had prohibited fathers who had wives or lawful children to give to their bastards, or to their mother, more than a four-and-twentieth part of their estates.[a] Which the Emperor Justinian, by the 89th Novel, chap. 12, extended to a twelfth part, leaving fathers who had no lawful

[i] § 4, *Inst. de success. cogn.* Although this text relates only to the successions on the father's side, and by the Roman law bastards were capable of succeeding to their relations on the mother's side, (*v. l.* 2, *D. unde cogn.*; — § 4, *Instit. de success. cogn.*,) yet nevertheless we have thought fit to put down the rule here in general, and conformable to the usage in France, which excludes them from all successions to intestates. For although some singular customs in France call bastards to the succession of their mothers, in conjunction with the children lawfully begotten, yet those particular usages are no reason why the contrary rule should not be looked upon as being the usage of France, and as being more agreeable to decency and good manners. See the preface to this second part, no. 12, and the seventeenth, twenty-second, and thirtieth articles of this section, and the fifth article of the first section *In what Manner Children and Descendants succeed.*

By the 18th Novel of Justinian, chap. 5, the children by a concubine had a sixth part of their father's succession if he died without lawful issue; and their mother had in this sixth part the same share or portion which every one of her children had according to their number.

[a] *L.* 2, *C. de natur. lib.*

issue or ascendants at liberty to give their whole estate to their natural children: and in case there were only ascendants, he reserved only for them their legitime.

2500. As to the customs of France, many of them allow parents to give to their bastard children, but differently. Some of them extend this liberty even to the license of instituting them heirs by their contract of marriage, or of making them gifts, with this effect, that the said dispositions shall stand good, except in so far as they may be prejudicial to the legitime or filial portion of the children; which is most notoriously contrary both to equity and common decency. There are other customs which permit the fathers and mothers of bastard children to give them what is necessary for their alimony and maintenance; which seems to imply a prohibition of giving them any thing more. And these bounds, which are settled indifferently for all sorts of bastards, and which, with respect to them all in general, are founded upon honesty and good manners, are still more just with regard to bastards born in incest, adultery, or some other criminal copulation, seeing that, by a law of Justinian's, these could not so much as claim alimony from their parents,[b] although it be agreeable both to natural equity, to the canon law, and to our usage, that such should be maintained by their parents.[c]

2501. It is sufficient to take notice here of these principles of honesty and decency, and of the distinction which ought to be made between the different sorts of bastards, without entering into the detail of the questions which might be raised touching the bounds or latitude of dispositions in their favor. For the detail of this matter is not regulated after the same manner by the Roman law, as it is by the custom and usage of France. So that this matter not having rules that are fixed, uniform, and common over all, it were to be wished that such were established: and this is not a matter that comes properly within the design of this book.

IX.

2502. *Strangers or Aliens do not succeed.* — Strangers, who are called aliens, are incapable of all manner of successions, whether they come by testament, or by the death of persons dying intestate.[1]

[b] *V. Nov.* 89, *c. ult.*

[c] *C.* 5, *in f. de eo qui duxit in matr. quam poll. per adult.*

[1] *L.* 1, *Cod. de hær. instit.*; —*l.* 6, § 2, *D. eod.* See what has been said touching stran-

X.

2503. *Professed Monks do not succeed.* — Professed monks do not succeed: and they are equally excluded by their vows both from succeeding to intestates, and by testament.[m]

XI.

2504. *Persons condemned to Death, or to Punishments which import Civil Death, cannot succeed.* — Persons condemned to death, or to some other punishment which implies civil death, are capable of no succession, whether they be called to it by testament or by the death of an intestate. And this incapacity makes the goods which ought to have come to them to pass to the other persons whom the law calls to the succession in their default.[n]

XII.

2505. *Corporations and Communities may succeed by Testament.* — Corporations and communities, such as towns, universities, colleges, hospitals, chapters, convents, and other societies, whether ecclesiastical or secular, which are established and approved by law, hold the place of persons, and being capable of possessing lands and goods, are likewise capable of testamentary successions. And those who have power to dispose of their estates may insti-

gers or aliens in the preface to this second part, no. 13. See the eleventh article of the second section of *Persons*, the eighteenth, twenty-third, and thirty-first articles of this section, the second article of the thirteenth section of this title, and the third article of the fourth section of the same title, together with the remark there made on it.

Strangers are not only incapable of succeeding, but are also incapable of making a testament. See the twelfth article of the second section of *Testaments*.

[m] By the fifth Novel of Justinian, chap. 5, the goods belonging to those who entered into a convent did accrue to the convent into which they entered themselves; and they could not afterwards dispose of them, and their children could retain no more of their said parents' goods than their legitime. In France the goods of one who enters into a religious order are not only not acquired to the convent into which he enters himself, but he cannot even dispose of them in favor of any convent or monastery whatsoever. But he may dispose of his goods before his profession, in favor of his relations or other persons, but not after he is once professed. See the nineteenth article of the ordinance of *Orleans*, and the twenty-eighth article of that of *Blois*. See, touching professed monks, the thirteenth article of the second section of *Persons*, and the nineteenth, twenty-fourth, and thirty-second articles of this section.

[n] *L.* 13, *D. de bon. poss.* See the twentieth, twenty-fifth, thirty-third, and following articles of this section, the fifth article of the fourth section, the first article of the thirteenth section, and the fourteenth article of the second section of *Testaments*. In France, by the ordinance of 1670, art. 29, of *Defaults*, the punishments which import civil death are sentence of death, or condemnation to the galleys for ever, or to perpetual banishment out of the kingdom.

tute the said communities, their heirs or executors, provided the law has not ordered any thing to the contrary.[o]

XIII.

2506. *Children who were not born before the Succession fell may succeed.* — We must not reckon among the number of persons incapable of succeeding, children who are not yet born when the succession falls, provided they were then conceived. For posthumous children, who are born only after the death of their fathers, do nevertheless succeed to them. And one may name for his heir or executor the posthumous child of another person. So that these children are equally capable of all successions which may fall to them, whether they come by testament, or by the death of an intestate.[p]

XIV.

2507. *The different Incapacities have their different Effects.* — All the causes of incapacity which have been explained have their different effects, according to their nature, and according to the time in which the persons happen to be under the incapacity.[q] Which depends on the rules which follow.

XV.

2508. *Difference between the Incapacities with Respect to the Two Kinds of Succession.* — As to what relates to the nature of the several sorts of incapacities, to wit, that of bastards, foreigners, professed monks, and of persons condemned to some punishment which implies civil death; the incapacity of bastards is distinguished from the others in this, that bastards are incapable only of legal successions, or succession to intestates, and are capable either of succeeding by a testament, or receiving some benefit thereby, according to the distinctions which have been remarked on the eighth article; but the other incapacities exclude the per-

[o] *L.* 1, *C. de sacrosanct. eccl.*; — *l.* 8, *C. de hæred. instit.* We must understand by the privilege mentioned in this text, the permission to form a society. For there can be no lawful society without the permission of the prince. See the fifteenth article of the second section of *Persons*. There are some communities which are incapable of successions, such as those of the mendicant friars. See, concerning dispositions made in favor of religious houses, the remark on the tenth article.

[p] § 4, *in f. Inst. de hæred. qual. et diff.*; — *Inst. de bon. poss.*

[q] See the following article.

sons who are under them equally from both the kinds of succession, and from all dispositions made in prospect of death.[r]

XVI.

2509. *Some Incapacities may cease, others last always.* — We must further observe concerning the nature of these four sorts of incapacities, that there are some of them which last always, and others which may cease,[s] as will appear by the rules which follow.

XVII.

2510. *The Incapacity of Bastards ceases by the Marriage of their Father and Mother.* — The incapacity of a bastard, whose father and mother might have been lawfully married together at the time of the child's conception, ceases in case the parents, being afterwards joined together in matrimony, own it for a lawful child, and the same is legitimated by the subsequent marriage.[t]

XVIII.

2511. *Naturalization makes the Incapacity of Foreigners to cease.* — The incapacity of foreigners may cease by naturalization. For the effect of naturalization is to give them the same rights and privileges with those who are natural-born subjects of the prince who grants them that favor.[u]

XIX.

2512. *The Incapacity of Monks ceases by the Nullity of their Vows.* — The incapacity of professed monks may cease if their vows happen to be null, and that, having protested against the same in due time, they procured them to be declared null by a court of justice, which they may do if they made profession before they attained the age prescribed by law, or within their year of probation, or if they have any other just cause to show.[x] But

[r] See the eighth article, and the remark upon it.

[s] See the following articles down to the twenty-sixth.

[t] *L.* 5, *C. de natur. lib.*; — *l.* 10, *eod.*; — *l.* 11, *eod.*; — *v. Nov.* 12, *c.* 4; — *Nov.* 74, *c.* 1; — *Nov.* 89, *c.* 8. See, touching the incapacity of bastards, the twenty-second and thirtieth articles. We shall say nothing here of the manner of legitimating bastards by letters patent of the prince, that being a matter which does not come within the design of this book.

[u] Cives allectio facit. *L.* 7, *C. de incol.* Although this text does not relate directly to letters of naturalization, yet these words may be applied to the effect of the said letters. See the twenty-third and thirty-first articles.

[x] The vows would be null if they were not preceded by one year of probation, and if

if their profession cannot be annulled, their incapacity will last always.

XX.

2513. *That of a Condemned Person ceases by a Remission, and in other Cases.* — The incapacity incurred by the civil death of the person condemned may cease, if he gets his sentence of condemnation to be reversed. And if he died before the accusation, or even before sentence of condemnation, he would have been under no incapacity.[y]

XXI.

2514. *Incapacities which cease both for the Time past and the Time to come, or only for the Time to come.* — Among the incapacities which may cease, it is necessary to distinguish between those which cease in such a manner as that the person whom they rendered incapable ceases to be such only for the time to come, without having any change made in his condition as to the time past; and those which cease so as that the person is considered as if he had never been incapable, and is restored so fully to his rights that he becomes capable even of the successions which fell to him within the time that his incapacity seemed to subsist. And this difference between these several sorts of incapacities is a natural effect of their causes, which consists in this, that the causes of some of them may be annulled in such a manner as if they never had existed: such as the entering into a religious order, which causes the incapacity of a professed monk, and the sentence of condemnation, which occasions the incapacity of the condemned person. For if the profession of a religious be declared null, and the sentence of a condemned person be repealed, both the one and the other return to their first condition, in the same manner as if the one had never made any profession, nor the other been condemned. But the causes of the incapacity of a bastard, and of that of a foreigner, cannot be abolished in the same manner. For the blemish that is in the birth of a bastard cannot be repaired in such a manner as to make his birth to be the same as if it had been lawful: neither can the defect of the original extraction of a

he who makes profession was not sixteen years of age complete. See the Council of Trent, session 25, chap. 15, and the ordinance of *Blois*, article 28. See, touching the incapacity of professed monks, the twenty-fourth and thirty-second articles.

[y] See hereafter the twenty-fifth and thirty-third articles, and the others that follow.

foreigner be supplied in such a manner as that his extraction should be the same as if he were a natural-born subject of the country in which he is naturalized. Thus, when a bastard is legitimated by the subsequent marriage of his father with his mother, and a foreigner naturalized by the letters patent of the prince, these changes do not abolish the blemish that is in the birth of the bastard, nor the defect that is in the extraction of the foreigner, but they make only the incapacity which was the effect of those causes to cease. And for this reason they cannot become capable of succeeding but for the time to come. We shall see in the following articles the use of this distinction in each sort of incapacity.[z]

XXII.

2515. *The Incapacity of Bastards can only cease for the Time to come.* — When a bastard is legitimated by the marriage of his father with his mother, seeing his legitimation does not reinstate him in a capacity which was natural to him, as has been said in the foregoing article, it does not make him capable of succeeding but for the time to come, and has not the effect to acquire to him the successions which fell in the time that his incapacity subsisted.[a] Thus, for instance, if we suppose that one who has a bastard, and no other children, renounces a succession fallen to him, and that afterwards this bastard comes to be legitimated by a subsequent marriage between his father and mother, the succession, which by the renunciation of the father would have gone to this bastard, if he had been legitimated at any time, and had been willing to accept of it upon the father's refusal, will not accrue to him by his legitimation, which happened only afterwards; but this succession will remain to the heir who, being the nearest of kin, and capable of inheriting, was willing to take it. And it would be the same thing, in the case of a succession falling to a foreigner, who should happen to have a bastard not as yet legitimated, but who is a natural-born subject of the country, or naturalized. For if this foreigner, who was incapable of the succession, should afterwards intermarry with the mother of the said bastard, and thereby legitimate him, this legitimation would not have the effect to give him right to this succession of which he was inca-

[z] See the articles which follow.

[a] This is a consequence of the defect in the birth of the bastard.

pable, not being legitimated at the time when the succession fell, and of which his father, as being a foreigner, was likewise incapable. But this succession would remain to him who had inherited it in default of them.

XXIII.

2516. *As likewise that of a Foreigner.* — It is the same thing as to the incapacity of a foreigner. For when he is naturalized, he is only made capable of the succession which may fall to him for the future. But all those which fell before his naturalization, and might have come to him if he had been capable of inheriting, remain the property of those who, by reason of his incapacity, were called to the succession. For this incapacity, as well as that of a bastard, was natural to the state and condition of his extraction. So that the capacity of inheriting, which the benefit of naturalization gives him, can have its effect only for the time to come,[b] as has been said in the twenty-first article.

XXIV.

2517. *The Incapacity of a Professed Monk may cease both for the Time past, and for the Time to come.* — The incapacity of a professed monk is in this respect different from that of a bastard, and of a foreigner. For as the monk could not have been rendered incapable, but by the vows which are called solemn, and which have no nullity in them; the nullities which are in his vows being discovered, the judgment which vacates and annuls his profession removes the cause of his incapacity, and puts him again in the same condition he was in before he took upon him the vows. Thus, he recovers his former right, and his incapacity ceases with its cause, both for the time past and for the time to come. Which distinguishes his condition from that of a bastard, and of a foreigner.[c]

XXV.

2518. *As likewise that of a Condemned Person.* — The incapacity of one condemned to some punishment which carries along with it civil death, having no other cause but the sentence of condem-

[b] This is a consequence of the state of a foreigner. See the thirty-first article, and the remark that is there made on it.

[c] This is a consequence of the nullity of the vows. See the two preceding articles, touching the difference between this incapacity and that of a bastard, and of a foreigner.

nation, if this cause happens to cease, the person who was condemned is restored to his former state, as the professed monk is, who has got his vows to be declared null. And this condemned person recovers all his rights, in the same manner as if he had never been under sentence of condemnation.[d]

XXVI.

2519. *Divers Times to be considered with Regard to the Effect of Incapacities.* — All the rules which we have just now explained respect the nature and differences of the several sorts of incapacities, which it was necessary to distinguish, that we might the better know how to make a right use of the rule explained in the fourteenth article. And we must likewise for the same reason distinguish the times in which the incapacity ought to be considered, whether it be in successions by testament, or to intestates.[e] And this depends on the rules which follow.

XXVII.

2520. *Three Times to be considered for the Incapacity of Testamentary Successions.* — As for testamentary successions, the capacity or incapacity of the testamentary heir or executor may be considered at three different times; to wit, at the time of making the testament, at the time of the death of the testator, and at the time of his entering to the succession, that is to say, when the heir or executor declares his willingness to accept of that quality.[f] We shall see hereafter the use of the distinctions of these several times.

XXVIII.

2521. *One Time only to be considered in the Succession of Intestates.* — In successions to intestates, the capacity or incapacity of the heir is to be considered only at the time of the death of the person to whom he succeeds. For it is this death that lays the

[d] See the thirty-third and the other following articles.

[e] See the following articles.

[f] *L.* 49, § 1, *D. de hæred. instit.*; — *l.* 6, § 2, *eod.*; — *d. l.* 49, § 2, *eod.* We have not set down in the article what is contained in these texts, that the incapacity which happens in one of these three times excludes the heir. For it is necessary to mitigate a little this rule of the Roman law by the temperaments which result from the following rules, and the remarks which shall be there made upon them, and particularly from what shall be said on the thirty-first article. See, on the same subject, the preamble to the tenth section of *Testaments*.

succession open: and by our rule, *that the dead man gives seizin to the living, his next heir of blood who is capable of succeeding to him*, the right of the heir of blood vests in him at the moment of the said death, and in such a manner that, if he comes to die immediately thereafter, without knowing any thing of the death of that other person, or that he had the right of succeeding to him, yet nevertheless he transmits his right to his heirs.[g] From whence it follows, that if the heir to whom an inheritance fell by the death of one dying intestate, whilst he was capable of inheriting the same, becomes afterwards incapable before he has exercised or even known his right, as if he enters into some religious order, or is condemned to death, or to some other punishment which is attended with civil death, this incapacity happening after the succession fell to him will not have the effect of transmitting the goods of this succession to the other heirs, who next to him had the right of succeeding; but it will only have the effect which is explained in the following article.[h]

XXIX.

2522. *Effect of the Incapacity happening after the Succession of an Intestate is open.* — If the heir to an intestate, who was capable of inheriting at the time of the death which lays the succession open, becomes afterwards incapable of succeeding by his entering into a religious order, or by virtue of a sentence of condemnation, before he has taken any step to assert his right, or even before he knew of it, the goods of the said inheritance having been vested in him as well as his other goods, they will pass to those who shall have his rights, whether they be creditors or others.[i] Thus, the goods of a professed monk will go to his heirs; and those of the condemned person will fall to the king, or to the lord of the manor who shall have the right to his escheat.

[g] This is a consequence of the rule, *the dead man gives seizin to the living.* We have conceived this rule in a manner agreeable to the usage of France, and pursuant to the maxim, *that the dead man gives seizin to the living, his next heir that is capable of succeeding to him*, although in the Roman law this rule was not common to all heirs of intestates, as shall be explained in the preamble to the tenth section of *Testaments*.

[h] See, upon this and the next article, the thirty-first article, and the remarks made there upon it. In this and the following article we have made mention only of the incapacity of a professed monk and of that of a person condemned to death, and not of that of a foreigner, because of the difficulties which are taken notice of in the remarks on the following article.

[i] This is also a consequence of the rule, *the dead man gives seizin to the living.*

Remarks on the Two Preceding Articles.

2523. We must observe on this and the foregoing article, that the incapacity of succeeding to intestates, which happens after the death which lays the said successions open, and before the entry to the inheritance, can relate only to the foreigner, the professed monk, and the condemned person. For as to the bastard, since he cannot cease to be legitimate after he has been once legitimated, no incapacity of this kind can afterwards happen to him. And as for the others, it is necessary to distinguish their conditions in what concerns the effect of the said incapacity which happens to them after the succession is open, and consider therein a difference between the incapacities of a professed monk, and of a condemned person, and that of a person who falls under the condition of a foreigner. This difference consists in this, that the incapacity happening to a professed monk, and to a condemned person, divests them of the successions which they had acquired before their incapacity, in the same manner as of all their other goods, and makes them to pass to those who have their right; whereas the incapacity which he falls under who becomes a foreigner does not divest him of the goods which he had acquired before the said incapacity. Thus, for example, if we suppose that a stranger who is a subject of a country to which our kings had granted the right of naturalization, having succeeded to one who died intestate, and having taken possession of his inheritance, should happen afterwards to lose the privilege of naturalization, by a general revocation of the privilege of naturalization which was given to the inhabitants of that country, and which would reduce all the inhabitants thereof to the condition of foreigners, that change would not deprive him of the succession which he had already acquired; and he would retain the goods of that succession, as well as his other goods. Thus, on the contrary, the incapacity happening to a professed monk, and to a condemned person, makes the inheritances which they had acquired, as well as their other goods, to go to those who have their right, as is said in the article. We make here this remark, touching the difference between the effect of the incapacity under which he falls who becomes a stranger, and the effect of the incapacity happening to a professed monk and to a condemned person, that we may account why, in this and the foregoing article, we have mentioned only the case of the professed monk and of the condemned person, and not that

of the stranger, because of a difficulty that is peculiar to the stranger, and which results from this difference between his condition and that of the others.

2524. The said difficulty consists in this, that on one part it is certain that, by our rule explained in the twenty-eighth article, the succession of one dying intestate is acquired to the heir at the moment of the death of the person to whom he succeeds, without any act on his part; from whence it follows, that, although after his death the said heir should become incapable, his right either remains with himself, or passes to those who succeed to him, or who have his right, as it happens in the case of a professed monk, and of a condemned person: and thus it would seem that the heir who is become a stranger, in the case that has been just now observed, ought to reap the benefit of the succession which had fallen to him, and to retain an estate which was his own, seeing he is not become incapable of holding possession of what he had, as a religious and a condemned person are, and that even it would seem that if, before the said incapacity, and without having done any act to declare his acceptance of the succession, he had assigned, given, or otherwise transferred his right to a person that was capable, the said disposition would not be annulled by his incapacity happening afterwards. But, on the other hand, considering the thing under another view, it might be questioned whether the incapacity happening to him before his entry to the succession might not hinder him from reaping the benefit of it; for it might be urged against him, that, not having entered to the succession before his incapacity, he would be within the meaning and intendment of the law which renders the stranger incapable of succeeding. Because the motive and inducement for making that law was to prevent the wealth of the kingdom from passing into the hands of strangers, which would happen in his person if, after he is become a stranger, he should be allowed to have the goods of that succession. And that therefore this law, which is a part of the public law, ought, with respect to him, to set aside the effect of the law which declares the heir to be seized of the inheritance at the moment of the death of the person to whom he succeeds, which is only a rule of the private law, that is to say, which regards only the interest of particular persons. To which it might be added, that it is the usage in France, even with respect to natural-born Frenchmen, who have been for a long time settled in a foreign country, although they have not been there

naturalized, that, if they return into France to reap a succession that is fallen to them, they are obliged to settle again in France, and not to alienate the goods of the succession which they claim. From whence this consequence might be drawn, that if, in cases of this nature, such precaution is taken with respect to a natural-born Frenchman, for fear he should remove into a foreign country the effects belonging to that succession, and the price which he might raise from the sale of the immovables, there would be as much, or rather more, reason to exclude from a succession one who is actually a foreigner at the time when he would enter upon it, unless it should be thought sufficient to forbid him to alienate it, or unless he should obtain letters of rehabilitation to reinstate him in his former capacity; for in that case he would without doubt succeed.

2525. This difficulty leads us to another, which would happen if he who was become a stranger had died in that state, and in the interval between the time that the succession fell which vested in him, he being capable of it, and his entry to the succession which his death had prevented. The difficulty which would arise in this second case would be between those who should exercise the king's right to the succession of aliens, and claim the succession of this person who, having become a foreigner, died in that state, and those who would dispute with them the said inheritance, claiming it as their right to succeed thereto in default of the said foreigner, in case the incapacity which he had incurred ought to be a bar to him. In this dispute it would be the interest of the king that the succession should belong to the heir who was become a stranger, that it might be a part of the stranger's estate, and so increase the escheat that falls to the king. And in order to support this pretension, it might be alleged that the motive of the law which excludes strangers from successions would cease in this case, seeing the goods would remain in the kingdom, and would go to the king. So that there would be no pretence for derogating from the rule, *the dead man gives seizin to the living*, as there is in the case where this heir becoming a stranger, and remaining alive, should pretend to inherit the succession. That thus this stranger being dead seized of the said inheritance, it would fall to the king, in the same manner as the other goods which he should leave behind him. That it would not be the consideration of favoring the right of the crown to the escheat of aliens, that would be the foundation of a judgment given in this

manner, but that this decision would be a natural effect of the rules of law. For seeing the professed monk and condemned person, who are capable at the time when the succession falls which they have a right to, are not excluded from it by the incapacity which happens before their entry to the inheritance; and that that incapacity has not the effect of transmitting the said succession to the other heirs who have a right to succeed in default of them, but that, on the contrary, it remains in their estate, and passes to those who have their right; it ought to be the same thing in the succession fallen to this heir, who becomes afterwards a stranger, and it ought to accrue to him so as to remain his during his life, in the same manner as all the other goods which he might have acquired by any other way, and which he would not lose on account of this change, and after his death this succession ought, as his other goods, to pass to those who should have his right.

2526. We do not mention here these different cases barely out of curiosity, but in order to show by the difficulties which occur in them, and by the principles which have been just now explained, and from which it would seem that the decisions thereof ought to be taken, what have been the reasons which have induced us to think, that, although by the Roman law the capacity of succeeding be necessary at the time of entering to the inheritance, even in the successions of intestates;[a] yet that the rule of this article ought to be conceived in terms conformable to the rule observed in France, *that the dead man gives seizin to the living*, which makes the capacity necessary for these successions only at the time of the death which lays the succession open, as appears in the cases of the professed monk and condemned person. So that it was not proper to put it down in the article as a rule in use with us, that in successions to intestates the capacity of the heir is necessary at two times; to wit, at the time of the death which lays the succession open, and at the time of the entry to the succession; and although it should be adjudged in the case of the incapacity of the person who became a stranger before he entered to the inheritance, that he could not succeed to it, yet it could

[a] By the Roman law, the heir to an intestate, who died before his entry to the inheritance, did not transmit his right to his heirs; so that he did not acquire the inheritance but by his entry to it. From whence it follows, that the incapacity which did afterwards happen excluded him from the inheritance. See the preamble to the tenth section of *Testaments*.

not be inferred from thence that the said judgment was founded on the rule of the Roman law, which requires the capacity at the time of the entry to the inheritance, seeing, notwithstanding that rule, those who have the rights of the professed monk and of the condemned person reap the successions which fell to them before their incapacity, although they did not so much as know of their right, and were become incapable before their entry to the inheritance. And therefore, seeing the said rule proves to be false in two cases of three which it may comprehend, as to what relates to incapacities, it cannot be placed in the number of rules, and cannot be assigned as a reason for excluding the person who became a stranger before his entry to the inheritance. But if it should be in fact decided that he ought to be excluded, it would certainly be for other reasons, such as those which have been remarked.

2527. All that has been said hitherto in this remark on the time at which we are to consider the capacity or incapacity of the heir, relates only to successions of intestates, of which only mention is made in the article. And as for the three times in which the rule of the Roman law requires a capacity for testamentary successions,[b] it is necessary to see the end of the remark on the thirty-first article, and the preamble of the tenth section of *Testaments*, where we have treated of transmission, which implies a necessity of knowing at what time the right of the heir accrues to him, in order to know whether he transmits it to his heirs or not. Thus, it is necessary to join together all that is said in those two places, where we have endeavoured to explain the different principles of the Roman law, and of the usage in France with regard to this matter, and to add thereto the principles of the law of nature and of equity, which we have judged might be of service to set this matter in a clearer light.

XXX.

2528. *Effect of the Incapacity of Bastards.* — Seeing the incapacity of bastards respects only the successions of intestates, they are either capable or incapable of them, according to the state they are in at the time of the death which lays the succession open. Thus, the bastard who is not legitimated by the marriage of his father with his mother before this death would not succeed, although he should happen to be legitimated before the succession

[b] See the twenty-seventh article.

were entered to; for, his incapacity at the time when the succession fell having excluded him from inheriting, it would pass immediately to the person who had the right to succeed in his default.[c] But he would be capable of reaping the benefit of the successions of intestates which should fall to him after his legitimation by the said marriage.

XXXI.

2529. *Effect of that of Foreigners.* — The incapacity of a stranger respects equally the successions of intestates and successions by testament. Thus, he who, being a foreigner at the time of the death of the person to whom he had a right to succeed, if he had not been under that incapacity, is not naturalized till after the said death, would not carry away the succession, whether the same was left by will or came by the death of an intestate, from the heir who succeeded to it because of the incapacity he was under.[d]

Remarks on the Preceding and Twenty-seventh Articles.

2530. We must not here pass over in silence some reflections on the difficulties which arise from the rule explained in this article, and from that which is laid down in the twenty-seventh article, whether they relate to successions of intestates or to successions by will. If we suppose, for a first difficulty, with respect to the successions of intestates, that a son of a natural-born subject of France, having taken up his abode out of the kingdom, and being become a stranger by his engagements in a country that is subject to another prince, returns to France with a design to get letters of rehabilitation, that is to say, to reinstate him in his first condition, and that he could not obtain the said letters till some days after

[c] This is a consequence of the nature of that incapacity. We presuppose in this article the capacity of bastards to succeed by testament, but it is necessary to remark on this subject what has been said on the eighth article.

[d] This is a consequence of the incapacity, and of the testamentary succession's being laid open by the death of the testator, as the succession of an intestate is laid open by the death of the person whose inheritance is the matter in dispute. For it is from the moment of that death that every heir ought to have his right. Insomuch that even the child which was not born at the time of the death of the person to whom it has a right to succeed, and the heir who does not enter to the estate for a long time after it is fallen to him, are considered as if they had succeeded at the moment of that death, according to the rule explained in the fifteenth article of the first section. Thus, the heir who is incapable at the time of the said death is excluded from the inheritance by him to whom it ought to pass.

the death of his father, would he be excluded from his father's succession by a collateral heir, or even by his own brothers, in case he had any? And would it not be just in this case that, being restored to his first estate by the effect of the said letters, in the same manner as the professed monk who gets his vows to be annulled reënters into his former state, he should succeed as if he had always continued a natural subject of France, such as he was by his birth? And even although he had been born a foreigner, the son of a foreigner who had been naturalized without him, would it not be sufficient that he should be naturalized after the death of his father to enable him to take his succession, which nobody had as yet entered to, seeing the incapacity of strangers is no part of the law of nature, and that it would be contrary to it in this case, where it would be necessary to prefer to this son the exchequer, or collateral relations, if there should be any who should lay claim to the succession? And would it not, on the contrary, be more agreeable to humanity and equity to apply in this case, for the benefit of the son, the spirit of the laws, which dispenses with their rigor when equity demands something else than what is enacted by the letter of the law, and especially in cases such as this, where the spirit of the law subsists together with the temperament of equity? For the motive of the law which excludes a foreigner from successions is to hinder the wealth of the kingdom from being carried into foreign countries, which would not happen in the person of this son who is naturalized, although it be only after the death of his father. It is for the like reason of equity, that, although those who die strangers can have no heirs, as shall be shown in the third article of the fourth section, yet the children of strangers who die in France succeed to their fathers if the said children are born in France, or have been naturalized there. And not only are children excepted from this rule, but it would seem that usage excepts from it likewise the collateral heirs of strangers, if the said heirs be natural-born subjects of France, or have been naturalized there; for the motive of the law ceases with respect to them. And there are some customs in France which call to the succession of aliens their heirs whatsoever, who are capable of succeeding to them.

2531. We might propose other questions, by supposing, for example, that instead of a son it were a brother, who was naturalized only after the death of his brother, whose succession he claims jointly with the other brothers, or in opposition to a cousin who

would exclude him from it; which might happen several ways, according as he puts in his claim whilst all things are yet entire, nobody having entered to the succession, or only after another heir has been for some time in possession of the goods, and has even disposed of them. But it is not our business to enter here into the detail of questions of this nature; and we have only touched upon this because of the difficulties which frequently arise in the use and application of the principles, in that they seem to demand decisions which may, at first sight, appear to be contrary to the said principles. For if the rule is absolute, and without exception, that every heir who is incapable at the time of the death of the person to whom he has right to succeed ought to be excluded from the succession, then the son who, as has been already mentioned, happens to be a foreigner at the moment of his father's death, he not having had the opportunity of being naturalized till some days after, will be excluded from having any share in his father's estate, either by his brothers, or, if he has no brothers, by his collateral relations; which appears to be so contrary to equity, that it seems but reasonable in this case that the matter should be decided against this rule. Since it is therefore the design of this book to explain in as clear a manner as is possible the principles and rules on which depend the decisions of the difficulties which arise in the matters treated of here, and since it seems reasonable that the case of this son should be an exception to the rule, we did not think fit to pass over in silence a remark of this consequence, and the reflection which was proper to be made on such a difficulty. We see that it consists in this, that the rule which excludes a foreigner from inheriting, and which is only an arbitrary rule of the positive law, being literally applied to this son who should happen to be a foreigner at the moment of his father's death, would be repugnant to a principle of natural equity, which calls the son to the succession of his father. So that, in a difficulty of this nature, it seems but reasonable to say that the spirit of the laws demands, in favor of this son, that, in order to preserve to him his right, we should give to the act of his naturalization the effect of reinstating him in the right of succession which he had by nature, and which was as it were suspended in his person by that arbitrary rule, the effect whereof is superseded by the act of naturalization. Thus, in this case, by giving the succession to the son, we do nothing else but observe the first principles of the interpretation of laws, which require that we should reconcile them by the universal spirit of

equity, which reigns in them all, and on which depends the good use both of the natural and arbitrary laws, according to the rules which have been explained in the title of the *Rules of Law*.

2532. The same consideration which hath induced us to make this remark on the case of the son obliges us, likewise, to consider the same case under circumstances where the difficulty would be much greater; as if he should not come to demand his father's inheritance till many years after his brothers, or even his collateral relations, had been in possession of it; would it be just in this case to reëstablish the son that is naturalized in his primitive and natural right? To trouble the quiet of the families of those who had succeeded to the estate by reason of his incapacity? To turn topsy-turvy the state of their affairs? To revoke the alienations which they have made? Or would it be just to give to this son a share of his father's estate, and upon what foot ought this share to be adjusted?

2533. We see by these kinds of difficulties, and others which may be supposed in the cases of children and brothers demanding a share in successions after their naturalization, how much it is to be wished that all such difficulties were adjusted by some certain rules, according to the divers circumstances of the time that is passed since the inheritance fell, the changes which may have happened, and others of the like nature. As to which it would not be improper to examine which of the ways to be taken for adjusting such difficulties would be most useful; whether to render altogether inflexible the rule which excludes the heir when he happens to be a foreigner at the time that the succession falls, and to limit the effect of all acts of naturalization to successions which shall afterwards fall; or to give to the said acts of naturalization the effect of removing the incapacity, as well for the time past as for the time to come, and to make the condition of a foreigner, in this particular, equal to that of a professed monk, and of a condemned person, who are restored to their rights when the profession of the one and the condemnation of the other are annulled, as shall be shown in the two following articles; or to leave the application of the rule, and the effect of the naturalization, to the discretion of the judges, that they may determine therein as they shall see cause according to the circumstances; or to limit a certain time, such as a year, or any other term, shorter or longer, beyond which the naturalization should have no effect for the time past, allowing a longer term for successions in the direct line than

for those in the collateral. Of all these ways the first would contain something of hardship in relation to the son, for the reasons which we have already mentioned: the second would be attended with two mischievous consequences, by putting families into great confusion and disorder, which is not to be apprehended in the case of professed monks and condemned persons, seeing their condition is always known, and can never be so long in suspense as the condition of a foreigner who is absent and unknown: the third way would have the inconvenience of making the law altogether uncertain, which, as well as other sciences, ought to have certain and fixed principles: and the last of these ways would seem to be the most equitable, and attended with the fewest inconveniences. But these difficulties are of such a nature, that to enter into a particular discussion of them would be to exceed the bounds of the design of this book, and perhaps we have already enlarged too much upon them.

2534. As for the testamentary successions, we shall confine ourselves to one reflection upon the rule of the Roman law, which requires that the person who is instituted heir should be capable, not only at the time of the death of the testator, and at the time of his entering to the inheritance, but likewise at the time of making the testament, in order to make the institution valid in its origin, *ut constiterit institutio;* these are the words of the text cited on the twenty-seventh article. And this rule has a relation to two other rules in the Roman law, one whereof is general, which declares that whatever is null or defective in its beginning can never become valid by length of time.[e] The other rule, which is a consequence of the former, and is called the *Catonian* rule, ordains that the dispositions of a testator which would have been null, if the testator had died at the time when he made his will, shall always remain such at whatever time the testator shall happen to die.[f] From whence it follows, that as the institution of one to be heir who is a foreigner at the time of making the testament would be null, if the testator should die immediately after having made his will, because this heir would be found incapable at that time of acquiring the inheritance, his incapacity at the time of making the testament would nevertheless exclude him from the succession, although he should happen to be naturalized at the time of the testator's death. We shall not here enter on the discussion of the

[e] *L.* 29, *D. de reg. jur.*

[f] *V. l.* 1, *D. de reg. Caton.*

use of this Catonian rule, of which we shall speak more fully in another place.[g] We shall only observe here, in relation to the rule of the Roman law, which requires that the testamentary heir should be capable at the time of making the testament, that, if we were to examine the justice of this rule, either by the principles of natural equity and of our usage, which is directly opposite to the niceties of the Roman law, or even by some principles of the Roman law itself, we might have reason perhaps to say, that as those who invented the Catonian rule have owned it to be false in certain cases,[h] so that rule which requires that the heir should be capable at the time of making the testament may likewise be the same.

2535. If we consider the principles of natural equity, and those of the Roman law which are the most conformable thereto, we shall find by these two sorts of principles, that testaments have not their effect but by the death of the testator; and that as until that time they are always revocable, so it is only at that moment that they have their validity. And consequently it is only at that moment that testaments have their effect, and that the dispositions of the testator begin to have the force of laws which the law gives them. From whence it follows, that the heir who is instituted by a testament begins only to have his right by the said death. Which proceeds from this principle, which we may call natural, and which is agreeable, likewise, to the spirit of the Roman law, that every testament implies in it the condition that the testator shall persevere in the same mind until the time of his death. Thus, it is a real truth, without any fiction or nicety, that the will of the testator hath not, even according to his own intention, any other force than that which his testament shall receive from his perseverance in his dispositions until the time of his death; in the same manner as if he had said expressly in his testament, that his meaning was that his dispositions should have their effect, in case he should die in the same intention, without making any alteration in them. For although this condition were expressed in this manner, yet it would not make the testament to depend any more upon it than it does when the condition is only tacitly implied. And it is alike true with respect to all testaments, that they will be of no validity unless the testators

[g] See the eleventh section of *Legacies*, the fifth article.
[h] *L.* 1, *D. de reg. Caton.*

die without revoking them, which they may do. From whence it follows, that it is always the death of the testator which, by fulfilling the condition of his perseverance in the same will until the last moment of his life, gives at that very moment to the testament its force and validity. Which has the same effect as if the testator had reiterated his testament at the time of his death, or had only then made it; in which case his heir, who was formerly an alien, and happens to be naturalized at that time, would succeed without any difficulty. We see, likewise, that it is certain, by an express rule in the Roman law, that if a foreigner was instituted heir on condition that he should be naturalized at the time of the death of the testator, this disposition would have its effect if the case should happen;[1] notwithstanding that the heir was incapable at the time when the testament was made, and for no other reason but that the condition would be expressed by the testator, and because the Catonian rule does not take place in conditional institutions,[1] as shall be explained in the place where we shall treat more fully of it, as has been already mentioned. Thus, since this condition when it is expressed had this effect, might not we suppose that the testator who has not expressly mentioned it has tacitly meant it, seeing he was desirous that his will should be executed in whatever manner it could? And where would be the inconvenience in considering the institution of an heir who should be an alien at the time of making the testament, as implying the condition that he should cease to be such at the time of the death of the testator? For might not this heir say, that his institution was not null, and ought not to continue so, but in case he were not naturalized at the time of the testator's death? And that in the mean while it remained in suspense, either to have its effect, or not to have it, according to the state in which he should happen to be at the time of the said death, which ought to give to the dispositions of the testator the character of a last will; since it is this essential character which is considered in all dispositions made in prospect of death, and which, by giving them their validity, gives them the effect which they are to have. To which we may add, that there are several cases in the Roman law in which this general rule, *that whatever is null in its beginning remains always so*, is false, as well as the Catonian rule. Thus, for example, deeds of gift between husband and wife were null by

[1] *V. l.* 26, *D. de hæred. inst.*

[1] *L. penult. D. de reg. Caton.*

the Roman law,[m] but if the donation was not revoked before the death of the donor, the said death ratified it in favor of the survivor.[n] Thus, for another example, if a Roman senator had married a woman who had been made free from slavery, the marriage was null; but if the said senator happened to lose his dignity, the marriage began to have its effect.[o] Thus, for a third example, which is a case in point to the present subject, taken out of the same body of the Roman law, if a testator had left a legacy in trust in favor of a slave, whose master had been condemned to some punishment which rendered him incapable thereof, as by the usage in France a perpetual banishment out of the kingdom would do, this legacy in trust, which was to accrue to the master through the slave, had its effect, if the master who was condemned was restored to his former condition,[p] although his incapacity at the time when the testament was made ought to have rendered it null. And if it should be said, that in this example the prince's favor had restored him who was incapable to his former capacity, in the same manner as if he never had been condemned; yet it is sufficient for the consequence which we pretend to draw from it, that although the disposition of the testator was not conditional, and that if he had died at the time he made his testament, the legacy in trust would have been null, yet it ceased to be so by the said change. Thus, the said rules ceased to take effect in this case, and proved to be false with respect to it. And, in fine, it may be said, that this rule which requires that the heir should be capable at the time of making the testament has been in all appearance a consequence of that ancient form of testaments which for a long time was the only one used at Rome, and which they called *per æs et libram*,[q] where the testator made an imaginary sale of his succession to his heir, who was present in person, and was the purchaser for a certain price in money which he put into a scale. Thus, it was necessary that the purchaser should be a citizen of Rome, and capable of purchasing a right to the succession; and as this was a mere superfluous nicety which was at last abolished, so this rule which requires the capacity of the heir at the time of making the testament, being a remainder of that nice formality in the ancient Roman testaments, might likewise very well be abolished, and that with the greater equity, because it seems that the

[m] *L.* 1, *D. de donat. int. vir. et ux.*
[n] *L.* 32, § 1, *et sequent. D. de donat. int. vir. et ux.*
[o] *L.* 27, *D. de rit. nupt.*
[p] *L.* 7, *D. de legat.* 3.
[q] § 1, *Inst. de testam.*; — *v. Ulp. tit.* 20; — *d. t. Ulp.* § 2.

rule which makes void the institution of an heir, and the legacies, which would have been null if the testator had died at the time when he made his will, was a fiscal law, made with a view to extend the effect of this incapacity in favor of the exchequer, which reaped the benefit thereof, and which is directly contrary to the spirit of our laws.

2536. If we suppose, then, that a foreigner who is naturalized, having no children of his own, but having several brothers who are likewise naturalized, except one who remains still a foreigner, should in his testament institute all his brothers his heirs, and that the brother who was not naturalized at the time of making the testament is naturalized before the death of the testator, could the brothers who were naturalized before the testament was made exclude from the succession the brother who was naturalized only afterwards, and allege against him that his incapacity at the time of making the testament rendered his institution null, although he was capable of succeeding at the time when his father died, and that thus, the testament subsisting with respect to the brothers who were naturalized before it was made, the other brother's portion ought to belong to them by the right which is called the right of accretion, and which shall be explained in its proper place?[r] It must certainly be that the said brothers should be thoroughly versed in the Roman laws, before it could ever enter into their minds to call in doubt their brother's right to his share in the said inheritance. And it seems to be certain that without this knowledge it would not only never enter into the mind of any person to raise such a dispute, but, on the contrary, whoever would act naturally, and follow the bare dictates of reason, would cry out against a rule which should have this effect to exclude the said brother. And it would be the same thing, if, instead of brothers, we should suppose them to be other collateral relations, who, having all of them an equal right to succeed as heirs if there were no testament, are called to the succession by a testament. Thus, it may be said that this rule has in it more of the character of the niceties of the Roman law than of equity, and that for this reason it seems that our usage would reject it. And although it be true that this rule, the application whereof appears odious in the cases where the persons called to the succession by a testament are the heirs of blood, yet it would not be so hard in the case where the

[r] See the ninth section of *Testaments*.

testamentary heir is another person than the heir of blood, or might be less entitled to favor according to the circumstances, yet seeing the rule is pure and simple, and general for all sorts of testamentary heirs, without any distinction, whether they be relations or strangers, it would be necessary to have an express rule which might set bounds to it. From whence it seems that we may reasonably conclude, that it would be just, and is much to be wished for, either that this rule were entirely abolished, or that the use of it were regulated by some law which might prevent the inconveniences thereof.

2537. All that has been hitherto said concerning the institution of an heir respects likewise legacies, and the other dispositions made in prospect of death; which, as well as the institution of the heir, were null according to the rules of the Roman law which have been mentioned. So that a legacy, for instance, for a sum of money to a friend of the testator's, or to some poor person, would be null, according to these rules, if the legatee who was capable of it at the time of the testator's death had not been also capable at the time when the will was made. We have thought ourselves to be under a necessity of making all these reflections, not only because of the consequence of all these difficulties, but likewise that we might give a reason why in the twenty-seventh article we have only mentioned that, in testamentary successions, it is necessary to consider, with respect to the capacity or incapacity of the testamentary heir, the time of making the testament, the time of the death of the testator, and the time of the heir's entering to the inheritance, without laying it down as a rule, that the capacity is necessary in all the said three times. And we may gather from all these remarks, and from those which have been made on the twenty-ninth article, and likewise from what results from the observations which have been made on the right of transmission, in the preamble of the tenth section of *Testaments*, that, as to what concerns testamentary successions, it seems to be agreeable to the spirit of our usage, which is directly opposite to the niceties of the Roman law, not to consider the incapacity of the testamentary heir but at the time of the death of the testator, as in the successions of intestates, and to apply even to that rule the temperaments which may appear to be necessary from the reflections which have been made in all these remarks, and which it is needless to repeat here.

XXXII.

2538. *Effect of the Incapacity of a Professed Monk.* — The incapacity of a professed monk, as well as that of foreigners, respects the two kinds of successions, both testamentary and that of intestates. And he who happens to be in that state at the time of the death of the person to whom he has right to succeed, whether it be as heir of blood, or by virtue of a testament, has no share in the inheritance. Thus, he does not transmit it to his heirs, but it passes to those who have the right to succeed in his default. But if the professed monk gets his vows to be declared null; seeing in that case he is restored to the same condition as if he had never made any profession, so he becomes capable, not only of the successions which may fall to him afterwards, but likewise of those which fell after his making profession;[n] provided that he brought his action in due time to have his vows annulled, and that he made those persons parties to the suit who claim an interest in the succession which is in dispute.

XXXIII.

2539. *Effect of the Incapacity of Condemned Persons.* — The incapacity of persons condemned to death, or to other punishments which import civil death,[o] excludes them, in the same manner as the incapacity of professed monks, from both the kinds of succession.[p] And the successions which might have come to them had they not been incapable pass to those persons who have the right of succession in their default, in the same manner as if the condemned persons had died before the succession fell. Thus, the son of a condemned person succeeds to his grandfather, to whom the father cannot succeed.[q] But if their incapacity comes to cease, they will be restored to their former condition, and will be equally capable of all successions, and even of those which fell before their incapacity was abolished.[r]

XXXIV.

2540. *This Incapacity takes Place only from the Time of Condemnation.* — Seeing the person that is condemned is rendered inca-

[n] This is a consequence of the nullity of the vows.

[o] See, in the remark on the eleventh article, what are the condemnations which have this effect.

[p] *L.* 13, *D. de bonor. possess.*

[q] *L.* 7, *D. de his qui sui vel al. jur. s.*; — *l.* 4, § 2, *D. de bon. libert.*

[r] See on this whole article the rules which follow.

pable only by the sentence of condemnation, which puts him in the state of incapacity which is produced by the civil death; the successions, whether they be of intestates or by testament, which may have fallen to him before his condemnation, and even after his accusation, belong to him in the same manner as his other goods, until he is stripped of them by his condemnation;[s] for till then it is uncertain whether he may not die before he receive sentence, whether he may not be acquitted, or whether he may not procure his pardon from the prince. Thus, his condition does not imply any incapacity until his condemnation.

XXXV.

2541. *If the Condemnation subsists, it makes the Incapacity to subsist likewise.* — If, after a sentence of condemnation which might be reversed, the case should happen of a succession which should go to the person condemned, if he were capable thereof, his right would remain in suspense until the event should either ratify or annul the condemnation; and if it subsists, it will make the incapacity to subsist likewise. As, on the contrary, the succession would belong to him if the effect of the condemnation should happen to cease, as it may by any one of the causes explained in the following article.[t]

XXXVI.

2542. *This Incapacity ceases in several Cases.* — The effect of the condemnation may cease either by the prince's pardon,[u] or by a decree of a superior court which annuls the sentence of condemnation,[x] or by the bare appeal itself, if the condemned person dies before the said appeal has been decided.[y] And in all these cases

[s] Si quis post accusationem in custodia fuerit defunctus, testamentum ejus valebit. *L.* 9, *D. qui test. fac. poss.*; — *l.* 1, § 3, *D. de legat.* 3; — *l.* 3, *D. de publ. judic.* The capacity of making a testament, and of succeeding, is the same. So that this text proves the one by the other. See the fourteenth article of the second section of *Testaments*.

[t] See the text quoted on the thirty-third article.

[u] *L.* 1, *C. de sent. pass. et rest.*

[x] The sentence of condemnation may be annulled by a decree of a superior court, which acquits the party, or which mitigates the punishment, and decrees another punishment which does not imply civil death.

[y] Provocationis remedio condemnationis extinguitur pronunciatio. *L.* 1, § *ult. D. dd. senat. Turpil.* Si quis cum capitali pœna, vel deportatione damnatus esset, appellatione interposita, et in suspenso constituta, sati diem functus est, crimen morte finitum est. *L. ult. C. si reus vel accus. mort. fuer.*; — *l.* 2, *C. si pend. app. m. int.* Si quis in capitali crimine damnatus appellaverit, et medio tempore pendente appellatione fecerit testamentum,

the incapacity ceases for all the time that is past. Thus, the successions which may have fallen to the said condemned person will belong to him, or to those who shall have his right.

Remarks on Articles XXXIII. to XXXVI.

2543. We must observe, on this and the three preceding articles, a difference there is between the rules of the Roman law and those of the French law, as to what relates to the matter of condemnations. By the Roman law no sentence of condemnation could pass against the party accused, unless he were heard in his own defence, but his estate was irrevocably confiscated if he did not appear within a certain time, and the giving judgment on the accusation was deferred till he should give an appearance. By the rules observed in France, which are the ordinances, there are two sorts of condemnations; that which is pronounced when the party accused is present in judgment, and that which is given in his absence, by which he is condemned to the punishments which the law inflicts for the crime, which is called a condemnation on account of contumacy, because of the disobedience which the party accused shows to the decree pronounced against him. Both these sorts of condemnations have this belonging to them in common, that both the one and the other import the civil death of the person condemned, and, by consequence, his incapacity. But whereas the condemnation which is passed against the party who is present in judgment is executed on his person by corporal punishments, and on his estate with regard to the forfeitures, fines, and the civil interest of the adverse party, so that his incapacity is reckoned from the day of his condemnation; the incapacity which arises from a condemnation on account of contumacy depends on what happens afterwards, and on the rule established by the ordinances, which directs that the condemnation on account of contumacy shall have its effect on the estate of the condemned person, as to the acquisition of forfeitures, fines, and the civil interest of those who have an interest only after the condemned person has suffered five years to elapse from the time of his condemnation without giving an appearance in judgment, in order to make his

et ita decesserit, valet ejus testamentum. *L.* 13, § 2, *D. qui test. fac. poss.*; — *l.* 6, § 6, *D. de injust. rupt.* This last text proves the capacity by the effect of the appeal.

See, at the end of the following remark, another way of annulling a sentence of condemnation, which is received in France, when the condemned person dies during his delay to purge his contumacy.

defence and undergo his trial. This is what results from the ordinance of Moulins, article 28; by which article the king reserves to himself the power of receiving the accused party to make his defence, even after the five years, according to the circumstances of the causes, the persons, and the times, and other considerations; these are the words of the said ordinance. And the same thing is ordained by the twenty-eighth article of the title of *Defaults and Contumacies* in the ordinance of 1670, which makes the five years to run only from the day of the execution of the sentence, that is to say, from that execution thereof which is by effigy, and not from the day of the condemnation. And by the twenty-ninth article of the same ordinance of 1670, the condemned person who dies after having suffered five years to elapse without presenting himself in court, or yielding himself up prisoner in order to take his trial, is reputed to be civilly dead from the day of the execution of the sentence for contumacy. According to these ordinances, if the condemned person happens to die within the five years, his condemnation will be without effect, seeing it is to have its effect only by reason of the contumacy of the condemned person, who has stood in contempt for five years without giving an appearance. From whence it would seem to follow, that he dies without incapacity, and that the successions which may have fallen to him after his condemnation go to his heirs, or to those who have his rights. And it is in this sense that the said ordinances are generally construed, although in some places it is otherwise adjudged. So that we may add to the three causes which make the incapacity to cease, as has been explained in the article, and which are common both to the Roman law and to the usage in France, this fourth cause, which is peculiar to the usage in France, and that is the death of the person who is condemned for contumacy, when he dies within the five years.

2544. We must likewise remark on this article, that we are not to understand what relates to the appeal from the sentence of condemnation, of all sorts of condemnations without distinction. For we must except the condemnations for crimes which are prosecuted after the death of the persons accused, such as the crime of high treason, and others, which it would be needless to mention here.*

* *V. l. ult. D. ad. l. Jul. majestatis;* — *ll.* 6, 7, 8, *C. eodem;* — *l.* 5, *Cod. si reus vel accusat. mort. fuerit.*

XXXVII.

2545. *One cannot give or bequeath to one that is Incapable, by the Intervention of other Persons.* — All the sorts of incapacities have this effect, which is common to them all, that not only one cannot bequeath any thing to a person who is incapable, naming him expressly in his will; but likewise all those dispositions which are called *tacit gifts, or bequests in trust*, where one leaves to some person whose name is made use of in order to convey by his means to one that is incapable by law, either the whole inheritance or some legacy, are annulled both with respect to the person that is incapable, and also with respect to him who lends his name for the carrying on this fraud.[z]

SECTION III.

WHO ARE THE PERSONS THAT ARE UNWORTHY OF BEING HEIRS OR EXECUTORS.

2546. THERE is this difference between the causes which render persons incapable of succeeding, and those which render them unworthy thereof, that the causes which render the heir or executor incapable of the succession have no particular relation to the duties which he owed towards the deceased, to whom he was to succeed; and that even of the four sorts of incapacity which have been explained in the foregoing section, there are three the causes whereof have nothing in them that is a transgression of any manner of duty whatsoever. But the causes which render the heir unworthy of the succession regard some particular duty, in which he may have failed towards the deceased whose succession he lays claim to, whether it was against his person while he was alive, or after his death against his memory; or even some other sort of duty, as in the case of the eleventh article. Thus, it is always on the account of some crime, or of some kind of offence, that an heir is declared unworthy of a succession.

2547. We must observe here, in relation to the persons who

[z] *L.* 3, § 4, *D. de jur. fisc.*; — *l.* 1, *eod.*; — *l.* 18, *D. de his quæ ut ind.* It appears from these texts, that by the Roman law what was given by a *tacit bequest in trust* was forfeited to the exchequer, when the fraud was well proved. But by our usage, the dispositions of this kind are only annulled, and the heir or executor retains what was given in fraud of the law, or of the custom. See the eleventh article of the following section.

have rendered themselves unworthy of the succession, a difference between the usage in France and the Roman law, which consists in this, that by the Roman law the inheritance which the heir was deprived of because of his unworthiness escheated to the exchequer,[a] which was observed, likewise, in the case of heirs to intestates, although they derived their right to the succession from the law, and not from the will of the deceased.[b] But according to the usage in France, when the heir is found to be unworthy of the succession, it passes to the person who has the right to succeed next after him, whether it be in the case of a testamentary succession, or of a succession to an intestate. For the punishment of the heir that is unworthy ought only to fall upon himself, and not upon the person to whom the inheritance ought to belong by reason of his exclusion. Thus, there appears to be in our usage more humanity and more equity than in the Roman law.

2548. Seeing the causes which render persons unworthy of being heirs may regard either both the kinds of succession, the testamentary as well as that of intestates, or only the testamentary alone, it will be easy to distinguish in each cause, either by the words of the article or by the remarks made upon it, to which of the two kinds of succession it relates.

ART. I.

2549. *The Heir that is unworthy is excluded from the Inheritance.* — Those who, being capable of succeeding, do render themselves unworthy thereof, are excluded from all successions, whether they come by the death of an intestate or by the will of a testator,[a] and the goods of the succession pass to those who, in default of them, have the next right to the inheritance,[b] as shall be explained by the rules which follow.

II.

2550. *Causes which render the Heir unworthy.* — The causes which may render the heir unworthy of the succession are indefi-

[a] *V. l.* 1, *D. de jure fisci*; — *toto titulo D. et C. de his quæ ut indign.*

[b] *L.* 9, *C. de his quib. ut indign.*

[a] *Toto titulo D. et Cod. de his quæ ut indign.* See the following articles, and the text which is cited in the preamble.

[b] We have added these last words, that the goods go to those who have the next immediate right to the inheritance, because, as has been remarked in the preamble of this section, the inheritances belonging to heirs who render themselves unworthy of them do not by our usage fall to the exchequer, as they did by the Roman law, but pass to the

nite, and the discerning of what may or may not be sufficient to produce this effect depends on the quality of the facts and the circumstances.[c] Thus, we are not to limit these causes to such as shall be explained in the following articles, where we have only mention of those which are expressly named in the laws. But if there should happen any other case where good manners and equity should require that an heir should be declared unworthy, it would be just to deprive him of the inheritance. Thus, for example, if one who has had an unlawful commerce with a woman of a bad life and conversation should institute her his heir or executrix, such an institution ought to be annulled.[d]

III.

2551. *If he attempts to kill the Person to whom he should succeed.* — If he who is to succeed as heir, either by testament or to an intestate, attempts any thing against the life of the person to whom he should succeed, he shall be deprived of the succession, although the attempt had not its effect, provided it be sufficiently proved.[e]

IV.

2552. *If he has any Hand in his Death, although it be only by Neglect.* — Although the heir did not make any attempt upon the life of the person whose estate was to come to him, yet if his death can be imputed either to the negligence or any other fault of this heir, as if he knew that others had a design to murder or poison him, and he did not discover it; or if, seeing him in danger of his life, he neglected to give him the aid and succour which he might have done, he shall be deprived of his inheritance in the same manner as if he had been the author of his death.[f]

other heirs who, in default of the heir that is unworthy, have the next immediate right to succeed.

[c] See the following article.

[d] Mulier in quam turpis suspicio cadere potest, nec ex testamento militis aliquid capere potest, ut divus Hadrianus rescripsit. *L.* 41, § 1, *D. de testam. mil.*; — *l.* 14, *D. de his quæ ut indign.*

Although the rule which results from this text be limited to the dispositions of soldiers, yet the morality upon which it is grounded ought to render it common to all other persons. For there is no person whatsoever who is not bound, as well as a soldier, to abstain from every thing that is contrary to decency and good manners.

[e] This case renders the heir unworthy, with much greater reason than those which are explained in the following articles.

[f] Indignum esse D. Pius illum decrevit, ut et Marcellus refert, qui manifestissime com-

V.

2553. *If he attempts any Thing against his Honor.* — The heir at law, or executor, who makes an attempt upon the honor of the person to whom he is to succeed, whether it be by becoming his accuser in a court of justice, or by joining in an accusation that is brought against him, is no less unworthy of succeeding to him than if he had attempted against his life.[g]

VI.

2554. *If there happens between them a Mortal Hatred.* — If there had happened between the testator and the person whom he had named his executor a mortal hatred and enmity, to such a degree as that there might reasonably be presumed from thence a change in the will of the testator, this would be a sufficient cause to exclude the executor from the succession, unless there was a reconciliation before the death of the testator. But a slight quarrel or difference would not have this effect.[h]

REMARKS ON THE PRECEDING ARTICLE.

2555. Although the laws cited make mention only of a legatee, and not of a testamentary heir, yet the rule seems to be much more just and equitable with respect to the testamentary heir, seeing in his case, as the kindness is greater on one side, so likewise is the ingratitude on the other; and he who is not worthy of a small favor is much less worthy of a greater.

2556. This rule is founded on a natural effect of enmity. For as every testator chooses his testamentary heir only in consideration of some merit which he discovers in him,[a] and that nothing is more opposite to the merit which recommends any person to the esteem of another than that which may produce hatred instead of

probatus est id egisse, ut per negligentiam et culpam suam mulier a qua hæres institutus erat, moreretur. *L.* 3, *D. de his quæ ut indig.*

Although this text speaks only of the testamentary succession, yet the rule is equally just in both the kinds of succession.

[g] *L. penult.* § *penult. D. de adim. vel transf. legat.* We might place in the same rank the heir who attempts upon the honor of the wife of the person to whom he is to succeed.

Although the text cited on the article mentions only a legatee, yet its decision seems nevertheless to be applicable, and with much greater reason, to executors and heirs at law. See the remark on the following article. See the texts cited on the two following articles.

[h] *L.* 9, *D. de his quæ ut indign. aufer.*; — *l.* 3, *in f. D. de adim. vel transf. leg.*; — *l.* 4, *eod.*; — *v.* § 11, *Instit. de excus. tut.*

[a] *L.* 9, *D. pro socio.*

friendship; the enmity, therefore, which falls out between the testamentary heir and the testator must necessarily produce this effect of changing the will of the testator who had named for his heir a person whom he now looks upon as his greatest enemy, and consequently of annulling a disposition which it is very probable the testator would not be willing to have executed. This is a consequence which naturally arises from the words of the first of the laws quoted on this article. And although it be true that enmities containing a mutual hatred between two persons are always unlawful, even on the part of those who have not been the first aggressors, and that every man ought always to preserve the spirit of the second law towards all others;[b] yet this truth does not destroy the equity of the law which annuls the wills of testators made in favor of persons against whom they afterwards conceive a mortal hatred, even although the said persons should be noways to blame on their part. For it is always certain that, if this enmity lasts to the death of the testator, it has two effects which annul the institution of an heir or executor who has since become an enemy. One is on the part of the testator, by the proof which it furnishes of his mind being changed with respect to the said heir; and the other is on the part of the heir, whom it renders unworthy of the succession; so that, as this heir by testament has no other title besides the good will of the testator, and the favorable opinion which he had conceived of him, he has no longer either any title or right to the succession. Thus, although the hatred should be much more unjust on the part of the testator than on that of the testamentary heir, yet the effect which it has by law of annulling the institution is not, upon that account, any thing the less just. For as to him who is instituted heir, he is justly deprived of the succession of which he is unworthy; and as to the testator, the injustice of his hatred against the person whom he had instituted his heir does not consist in the annulling of the institution, but only in this, that he is wanting in his duty, in not loving him with that brotherly love which he owes to all mankind in general. And since this duty of brotherly love does not oblige him to name for his heir a person who not only has no manner of right to his inheritance, but is even unworthy of it, and that, on the contrary, the said duty leaves him at full liberty to leave his estate either to his heir at law, or to any other person whom he pleases to choose;

[b] See the fourth and sixth chapters of the *Treatise of Laws*.

it is therefore without any injustice that the law annuls the institution when there falls out afterwards a mortal hatred between the heir that is instituted and the testator.

2557. We have restrained this rule to the testamentary heir; for besides that the laws quoted on this article have relation only to the dispositions of testaments, the condition of those who succeed as heirs to intestates ought to be distinguished from that of testamentary heirs, as to what regards the effect of the enmity that happens between the heir and the testator; because that whereas the testamentary heir owes the succession barely to the will of the testator, the heir of blood who succeeds to an intestate derives his right from the provision of the law. So that we may say, that an enmity which does not go to that height which has been mentioned in the foregoing articles would not be sufficient to exclude the heir at law from the inheritance of his kinsman, who, by choosing to die intestate, would by that sufficiently declare his mind that he was not willing his estate should go to any others but to those who should be entitled to it by law. And much less ought enmity to exclude the heir at law in the provinces of France, which are governed by their customs, where it is not allowed to deprive the heirs of blood of that part of the estate which is appropriated to them by the said customs; because if enmity were to have that effect, it might happen that a testator who should chance to have some quarrel with his heir at law might turn it into hatred, and so heighten it to such a degree as might furnish him with a pretext for making a will to his prejudice, and for eluding the law.

VII.

2558. *If he calls the State of the Testator in Question.* — If the heir who is instituted by testament has done any great injury to the testator, or used him so basely as to render himself unworthy of the benefit he receives by his will, he shall be deprived of it; and with much more reason will he be deprived of this benefit if he was the author of, or any way concerned in publishing, a defamatory libel reflecting on the testator's honor, or if he had commenced a lawsuit against him in relation to his state and condition. As if, the testator pretending to be a gentleman, he had contributed to make him lose that quality; or if he had attempted to get him declared a bastard.[1]

[1] *L.* 9, §§ 1 *et* 2, *D. de his quæ ut indign. auf.* Defamatory libels are placed in the num-

VIII.

2559. *If he does not prosecute the Authors of his Death.* — The heir, whether he succeed by testament or as heir at law, who neglects to bring to condign punishment the murderers of him to whom he has a right to succeed, renders himself, by that neglect, unworthy of the succession.[1] Unless he should deserve to be excused upon account of the tenderness of his years, as if the said heir was a minor, or for some other reasonable cause, according to the circumstances.[m]

IX.

2560. *If he treats concerning the Succession during the Testator's Life, and without his Knowledge.* — If any one, before the death of the person whose estate is to come to him, either by testament or by right of blood, should in prospect thereof dispose of any of the effects belonging to the said estate, without the consent of the said person, he would thereby render himself unworthy of succeeding to him.[n]

X.

2561. *If he hinders him from making a Testament.* — If he who is named heir in a testament had hindered the testator from making a second will, whether it were by force or by any other un-

ber of capital crimes. *V. l. un. C. de fam. libel.* And they deserve this punishment more than any injury or any insult whatsoever.

We must likewise make the same remark here, that although the text cited on this article speaks only of a legatee, yet it may be applied with much greater reason to the testamentary heir.

If, in the case of two persons contending for the same inheritance, one of them should contest the state of the other in order to exclude him from it, having some reason to believe him to be either a bastard or an alien, and incapable of succeeding, and the person whose state was called in question was adjudged to be lawfully begotten, or a natural-born subject, and afterwards he comes to die having for his heir at law the person who had called his state in question, the said heir would not upon this account be judged unworthy of succeeding to him. For his controverting the other's state under these circumstances ought not to be imputed to any design in him to do harm; since it tended only to discover the truth of a matter of fact, which was uncertain, and on which depended the right of the contending parties. But as for defamatory libels, atrocious injuries, and bad treatment, seeing they are crimes punishable by law, and such as destroy men's reputation, which is much dearer to them than life itself, it seems just that the heir at law who has been guilty of any of the said crimes should be declared unworthy of the inheritance.

[1] *L.* 17, *D. de his quæ ut indign.*; — *l.* 1, *C. eod.*

[m] *L.* 6, *C. eod.*

[n] *Ll.* 29 *et* 30, *D. de donat.*; — *l.* 2, *in f. D. de his quæ ut indign.*

lawful means, he would be unworthy of succeeding to him. It would be the same thing if he to whom the inheritance belongs by right of blood should make use of the same indirect means to hinder the person whose succession would fall to him by law, in case there were no testament, from making one. And he who should use violence, or any other unlawful way, to extort a testament in his own favor, or in favor of other persons in trust for him, would with much greater reason be debarred from reaping any benefit by the said testament. And in all these cases, the authors of such unlawful ways, together with their accomplices, will be liable to be punished, according to the quality of the facts and the circumstances.[o]

XI.

2562. *If he has lent his Name for a tacit Bequest in Trust.* — We may place in the rank of persons unworthy of successions those who lend their names to testators, that they may be named heirs in order to convey the effects to persons whom the law has excluded. And these sorts of dispositions, which are called *tacit fiduciary bequests*, remain without effect, if the fraud appears. And he who is named heir, as well as the person to whom he was to restore the goods of the succession, shall be deprived of them; the one as being incapable, and the other as being guilty of a cheat, which the laws liken to a robbery or a theft.[p]

XII.

2563. *The Heir who is unworthy restores the Fruits and the Interest.* — The heir that is unworthy, and who has already enjoyed some part of the inheritance, ought to restore all the fruits thereof, and the other revenues which he has received during the whole time of his possession, as likewise the interest of the money which he has received, whether it be from persons indebted to the succession, or from the sale of some of the movables, or upon other accounts. For he is of the number of unjust possessors, even before any action is brought against him.[q]

[o] *L.* 1, *D. si quis aliq. test. prohib. vel coeg.*; — *l.* 2, *eod.*; — *l.* 2, *C. eod.*; — *l.* 1, *C. eod.* See the fourth article of the second section of *Legacies*. See the twenty-fifth and following articles of the fifth section of *Testaments*.

[p] *L.* 10, *D. de his quæ ut ind. auf.*; — *l.* 46, *D. de hæred. petit.* See the last article of the foregoing section.

[q] Hæredes, quos necem testatoris inultam omisisse constiterit, fructus integros coguntur reddere. Neque enim bonæ fidei possessores ante controversiam illatam videntur

XIII.

2564. *Difference between the Causes which render Heirs unworthy.* — Among all these causes which we have just now explained, and which may render an heir unworthy of the inheritance, we must distinguish between those which may cease to have their effect, and those whereof the effect can never cease. Which depends on the state in which matters are at the time of the death of the person whose succession is in question, and on the rules which follow.[r]

XIV.

2565. *Of those which render the Heir unworthy at the Time of the Death of the Testator.* — If the cause which may render the heir unworthy subsists at the time of the death which lays the succession open, and the heir cannot justify himself against the charge, he shall be irrevocably excluded as unworthy. For being found to be such at the moment that the inheritance falls to him, he cannot acquire it, and the estate goes to the person whom the law calls to the succession.[s]

XV.

2566. *Of those which have ceased at the Time of the Death.* — If the cause which might have rendered the heir unworthy did cease, as if it was a mortal hatred, or other cause, which a reconciliation with the deceased, or a justification of the heir, had abolished, the obstacle ceasing, he might succeed.[t]

fuisse, qui debitum officium pietatis scientes omiserunt. Ex hæreditate autem rerum distractarum, vel a debitoribus acceptæ pecuniæ post motam litem bonorum, usuras inferant. Quod in fructibus quoque locum habere quos in prædiis hæreditariis inventos, aut exinde perceptos vendiderint, procul dubio est. *L.* 1, *C. de his quib. ut ind.*

Although this text speaks only of the heir who has not revenged the death of the deceased, yet this rule agrees to all the cases of the other causes which may render the heir unworthy.

Seeing the unworthy heir is called in this text an unfair possessor, even before any action is brought against him, *ante controversiam illatam*, why should he be accountable for the interest of the money which he shall have received, either from the debtors to the succession, or from the sale of any of the movable goods, only from the time that the suit is commenced, as it is said in this text? Unless it were that the text is to be understood of money that is in being, or that is still owing by those who have bought any thing of the said heir.

[r] See the following articles.

[s] This is the effect of the cause which renders him unworthy.

[t] See the sixth article.

XVI.

2567. *Distinction of the Causes with Respect to the Two Sorts of Successions.* — Among the causes which render the heir unworthy, we must distinguish between those which regard equally the successions of intestates and testamentary successions, and those which can have respect only to testamentary successions. For this distinction is necessary to be observed, in order to prevent our giving to the causes which render the heir unworthy another effect than that which they ought to have according to law and equity.[u] And it will be easy to judge, by the reading of every article, to which of the two successions each of the said causes ought to be applied.

SECTION IV.

OF THOSE WHO CAN HAVE NO HEIRS OR EXECUTORS.

2568. HAVING explained who are the persons who cannot be heirs or executors, order requires that we should, in the next place, show who are the persons who cannot have heirs or executors. And this is different in testamentary successions from what it is in the succession of intestates. For, as shall be explained in this section, there are some persons who are capable of having heirs at law, and cannot have testamentary heirs.[a] There are others, on the contrary, who cannot have heirs at law, and who are capable of having heirs by testament.[b] And there are some who can neither have heirs at law nor heirs by a testament.[c]

2569. We might reckon in the number of persons who cannot have heirs those who possess only those kinds of estates which we see in some customs, and which are said to be of a servile condition or of mortmain, of which we have already spoken in the preface, no. 15. For as to estates of this nature, it is the lord of the manor who succeeds when there are no children; and he excludes all others, whether they be heirs at law or heirs by testament, as has been remarked in the above-mentioned place.

[u] This article is a consequence of the former.
[a] See the first article of this section, and the remark that is there made upon it.
[b] See the second article.
[c] See the third article.

ART. I.

2570. *Persons incapable of making a Testament cannot have an Executor or Testamentary Heir.* — All persons who are incapable of making a testament, whether it be for want of age or for other causes, which shall be explained in their proper place,[a] cannot by consequence have executors or heirs by testament. But their inheritance goes necessarily to the person whom the law calls to succeed.[b]

II.

2571. *Bastards can have no other Heirs, if they die intestate, but their Children.* — Bastards who have estates may dispose of them by will, and their children may succeed to them as their heirs at law, if they have any that are lawfully begotten. But if they die without children, and intestate, as they have no legal parentage with any person, so they can have no heir at law.[c]

III.

2572. *Foreigners can neither have Executors, nor Heirs at Law.* — Foreigners who die without being naturalized can have no heir, neither heir at law nor testamentary heir.[d]

IV.

2573. *Professed Monks have either Testamentary Heirs, or Heirs at Law.* — Professed monks have for their heirs, either the persons whom they may institute by a testament, if they think fit to make any before their profession, or those to whom their inheritance

[a] See the second section of the first title of the third book.

[b] We may reckon, in one sense, among the persons who cannot have testamentary heirs, those whose estates are situated in the provinces of France which are governed by their customs. For there they know no other heirs besides those of blood; and they give the name only of universal legatees to those who, not being called to the succession by law, are instituted heirs by a testament.

[c] *L. 4, D. unde cogn.* See the eighth article of the second section, and the remark that is there made on it. The successions of bastards belong to the king, by virtue of that right which is called right of bastardy, or to the lord of the manor.

[d] See the ninth article of the second section, and the articles which are there quoted. We must except from this rule strangers who have children or relations born in France, or naturalized; for they may succeed to them, as has been remarked in the thirty-first article of the second section. And we must likewise except the strangers who come within the case of the ordinances of 1463, 1583, and 1569, which allow foreign merchants, who frequent the fairs of Lyons, to make their wills, and their heirs at law to succeed them when they die intestate. The successions of foreigners belong to the king, by virtue of that right which is called right to the estates of aliens.

belongs by law, if they have not disposed of it by will. And the estate which belonged to them at the time of their profession goes to their heirs. For their vows put them into the state of a civil death, which, rendering them incapable of possessing any goods, has the same effect as a natural death in laying their succession open.[e]

V.

2574. *Condemned Persons have no Heirs.* — Persons condemned to death, or to other punishments which imply civil death, and dying in that condition, can have no heirs. For their condemnation has stripped them of all their goods, which go either to the king, or to the lord of the manor who has right to the escheat.[f] But if their condemnation is annulled by any one of the ways explained in the thirty-sixth article of the second section, their goods will descend to their heirs.

VI.

2575. *Persons who have no Relations have no Heirs at Law.* — Those who either have no relations at all, or only such as are aliens not naturalized, have no heirs if they die intestate.[g] But they may dispose of their effects by will, if they are under no incapacity of making one.

SECTION V.

OF THE RIGHTS WHICH ARE ANNEXED TO THE QUALITY OF HEIRS AND EXECUTORS.

2576. This whole section, which relates to the rights of heirs and executors in general, and the three following sections, which treat of the charges of heirs and executors likewise in general, are as it were a plan, in which it was necessary to distinguish the said

[e] See the tenth article of the second section, and the remark that is there made on it.

[f] This is a necessary consequence of the state of those condemned persons. See the eleventh article of the second section, and the other articles there quoted.

[g] *L.* 1, *C. de bon. vacant.* The estates of those who leave behind them no heirs, neither testamentary heirs nor heirs of blood, belong to the king, by virtue of that right which entitles him to the successions of all those who leave no heirs behind them. See the preface to this second part, no. 13, and the first article of the thirteenth section of this title.

rights and the said charges, and to give this first view of them, that their order may be the better understood, before we enter upon explaining the particulars. For this detail, containing a great number of rules, which are to be treated of in different places, and which make different matters, it is necessary to give the idea of the said matters all in one place, and there to lay down the principles and general rules which are to enter into this plan, and which ought to precede the detail of all the said matters, each of which will have its proper detail in its proper place; as shall be explained in the remark subjoined at the end of the eighth section.

2577. The same reason which has induced us to make this plan obliges us likewise to acquaint the reader, that he must not take those things for repetitions, which are to be met with either in the foregoing sections, or in the remaining part of this treatise, which may seem to have any resemblance with what shall be explained in these four sections. For either there will be found some difference between the things themselves, or, if the same thing be repeated in different places, it will appear to have been necessary in both places, either for method's sake, or for some other consideration.

ART. I.

2578. *Right to accept the Succession, and to take Possession of the Goods.* — Seeing the heir or executor is universal successor, the first right which this quality gives him is to accept the succession, to take possession of the goods, to claim such of them as shall happen to be in the hands of other persons, to call in the debts, and to dispose of every thing belonging to the succession as owner and master.[a]

II.

2579. *The Entering to the Inheritance hath its Effect from the Day of the Death.* — This right of the heir or executor hath this

[a] *L.* 37, *D. de reg. jur.* See the first article of the first section. We must not confound the right to accept the succession which is spoken of in this article with the right or title which makes one heir or executor. The right of accepting the inheritance depends on the will of the heir or executor, but not the title which makes him heir or executor; to wit, the testament in testamentary successions, and the proximity of blood in the succession of intestates.

See, concerning the accepting of the inheritance, and the difference between the right to the quality of heir or executor, and the right of accepting that quality, what is said thereof in the preamble to the third title of this first book, and in the places quoted at the end of the said preamble.

effect, that although he does not know that the succession is fallen to him until a long time after, or that knowing it he delays to accept it, yet from the moment that he begins to intermeddle with it he acquires all the rights belonging to the succession, in the same manner as if he had entered to it at the time of the death of the person to whom he succeeds. And whatever may have augmented the succession during that interval will belong to him.[b]

III.

2580. *The Heir may renounce the Inheritance.* — Seeing successions may be sometimes more chargeable than profitable, the heir, whether he be testamentary heir or heir at law, who does not think it convenient to accept of that quality, has a right to renounce it;[c] but this he must do whilst things are still entire; that is, before he has done any act which implies his acceptance of the succession. For, as has been said in another place, he who has once been heir or executor can never cease to be such.[d]

IV.

2581. *The Heir may deliberate whether he shall accept of the Succession or not.* — If the heir is in doubt whether the succession be advantageous or not, he may take a time to deliberate whether he shall accept or renounce it;[e] as shall be explained in the first section of the second title.

V.

2582. *The Heir may accept the Succession with the Benefit of an Inventory.* — In the same case with that of the foregoing article, the heir may, without deliberating, if he does not think fit to take that method, declare himself heir with the benefit of an inventory, that is, by getting an inventory of all the goods, to be made in due form. Which will have this effect, that he will be answerable for the debts no farther than to the value of the goods, and be only accountable for them; and if he himself has any demand on the inheritance, the same will be preserved entire to him.[f] It is

[b] *L.* 138, *D. de reg. jur.* See the first article of the eighth section.

[c] *L.* 13, *D. de acquir. vel omitt. hæred.*; — *l.* 16, *C. de jure deliber.* See the fourth section of the third title of this first book.

[d] See the tenth article of the first section of this title.

[e] *L.* 1, § 1, *D. de jure deliber.*; — *l.* 5, *eod.*

[f] *L. ult.* § 2, *C. de jure delib.*; — *d. l.* § 9, *in f.* See the second title.

this benefit of an inventory which shall be the subject-matter of the second title.

VI.

2583. *He may demand that the Legacies and Bequests in Trust be reduced, when there is Ground for it.* — Although the goods of the succession exceed the debts that are owing by the deceased, yet if the heir, whether he be heir by testament or heir of blood, be charged by a testament, or codicil, with legacies, bequests in trust, substitutions, or other dispositions which diminish the portion of the goods of the inheritance that is appropriated by law to the heir or executor, he has a right to demand that these sorts of dispositions be moderated; as shall be explained in the proper place.[g]

VII.

2584. *The Heir may sell the Inheritance, make it over by Deed of Gift, or dispose of it otherwise.* — Although the heir who has once taken upon him this quality cannot afterwards divest himself of it in such a manner as not to be any more subject to the charges of the succession which he had accepted, yet he has nevertheless the right to sell it, to make it over by deed of gift, or to dispose of it by any other title, for the behoof of another person who enters to his rights, and who obliges himself to acquit the charges.[h] But although this heir has stripped himself of the goods of the succession, yet he remains still bound for all the debts, and has only his recourse against the person who, having got the succession, ought to warrant him against them.[i]

VIII.

2585. *Right of Transmitting the Inheritance to his Heir.* — We may place in the number of the rights belonging to the heir that of transmitting, after his death, the inheritance which had fallen to him to the persons who shall succeed to him, although he had not declared his acceptance of the succession, nor done any act as heir. This is the right which is called right of transmission, and which shall be explained in its proper place.[l]

[g] *L.* 1, *D. ad leg. Falc.* See the third title of the fourth book, and the fourth title of the fifth book.

[h] *Toto titulo D. et C. de hæreditat. vel act. vend.*

[i] *L.* 2, *C. de legat.*

[l] See the tenth section of *Testaments*.

IX.

2586. *There are some Rights which do not go to the Heirs.* — We must not reckon among the rights belonging to the heir all those which the person had to whom he succeeds. For there are many rights which are restrained to the persons themselves, and do not go to their heirs.[m]

X.

2587. *The Right of the Heirs of Blood to the Goods appropriated to them by Law.* — It is necessary to remark among the rights belonging to heirs the peculiar right which children, and other descendants and ascendants, have to a legitime, or certain portion of the goods, which cannot be taken away from them, and of which we shall treat in its proper place.[n] And also the right which the collateral relations have, in the provinces of France governed by their customs, to the goods which are appropriated to them, and which cannot be disposed of to their prejudice.[o]

XI.

2588. *Right of Partition among Coheirs.* — When there are several heirs, each of them has a right to oblige the others to come to a partition of the effects and charges of the inheritance.[p]

XII.

2589. *Right of Accretion among Coheirs.* — In the same case, where there are many heirs, they have among them reciprocally that right which is called right of accretion, which hath this effect, that in default of any one of them his right passes to the others, pursuant to the rules of this matter, which shall be explained in their proper place.[q]

XIII.

2590. *Right of Collation of Goods.* — Among several coheirs to an ascendant, whether they succeed by right of blood or be called by testament, every one has a right to oblige his coheirs, who may have received any goods from this ascendant to whom they suc-

[m] See the fifth article of the first section.
[n] See the third title of the third book.
[o] See the preface to this second part, no. 7.
[p] See the fourth title of this first book.
[q] See the ninth section of *Testaments*.

ceed, to bring them in; that is to say, to put them into the mass of the estate, that they may be likewise comprised in the partition. This is called the right of collation of goods, which makes a matter by itself, the rules whereof shall be explained in its proper title.[r]

XIV.

2591. *Right of Reversion.* — When ascendants succeed to their descendants, and chance to have coheirs, as it happens in the cases which shall be explained in their proper places,[s] if the said ascendants had made any donations to their descendants to whom they succeed, that which they had given them does not enter into the partition, but returns to them by that right which is called right of reversion, which shall be explained in its place.[t]

SECTION VI.

OF THE SEVERAL SORTS OF ENGAGEMENTS OF HEIRS OR EXECUTORS.

ART. I.

2592. *Engagement to the Succession by the bare Effect of Acceptance.* — The heir, whether it be the heir at law or heir by testament, who has accepted of this quality, or who has done any act which makes him heir, as shall be explained in the first section of the third title, enters into a general engagement, which obliges him to all the consequences of this quality of heir, and to all the charges of the inheritance, by the bare effect of his acceptance. For the act which makes him heir is, as it were, a contract between him and the persons to whom this quality may oblige him, by which he takes the goods on condition to acquit the charges.[a]

II.

2593. *Several Sorts of Engagements of Heirs.* — The engagements of heirs are of several sorts, in the same manner as the charges of the inheritance. And in order to understand aright the

[r] See the fourth title of the second book.

[s] See the first section of the second title of the second book.

[t] See the third section of the same second title of the second book.

[a] *L.* 4, *D. quib. ex caus. in poss. eat.*; — *l.* 3, *in f. eod.*; — *l.* 5, § 2, *D. de oblig. et act.*; — § 5, *Inst. de oblig. quæ quas. ex contr. nasc.* See the first article of the eighth section.

nature of each engagement, and the order of them all, it will be necessary to make the following distinctions.[b]

III.

2594. *The First General Engagement for all the Charges of the Inheritance.* — The first engagement of an heir or executor is that general and indefinite obligation which he contracts with all those who may have any demand on the inheritance, although he be ignorant who those persons are and what their demands are; and that even although the goods of the succession be not sufficient to satisfy them all, unless he has taken the precaution which has been mentioned in the fifth article of the fifth section.[c]

IV.

2595. *All the Particular Engagements are reduced to Two Kinds.* — All the particular engagements which may be comprised under this general and indefinite obligation are distinguished into two kinds, which include them all without exception. The first is, of those which the person to whom the heir succeeds may impose upon him; and the second is, of all those which are independent of the will of the said person. Thus, the legacies are of the first of these two kinds; and the passive debts of the deceased, that is, those which are owing by him, are of the second kind.[d]

V.

2596. *Several Charges which may be imposed on the Heir.* — The charges which one may impose on his heir or executor are of several sorts, such as legacies and donations made in view of death, which we shall treat of in the fourth book; substitutions and fiduciary bequests, which shall be the subject-matter of the fifth book; and all other dispositions which the deceased may have made, and which put his heir under some engagement; such as that which may regard any restitutions to be made by him, his funeral expenses, if he has given any directions about them, and others of the like nature.[e]

[b] See the following articles.

[c] This is a consequence of the first article. *L.* 8, *D. de acquir. vel omit. hæred.*

[d] There can be no engagement but what belongs to one or other of these two kinds.

[e] See the fourth and fifth books, and the eleventh section of this title.

VI.

2597. *Charges to which the Heir is liable, although the Deceased has not expressly obliged him to them.* — The charges to which the heir or executor is liable, although the person to whom he succeeds has ordered nothing concerning them, are likewise of several sorts; such as the debts owing by the deceased, whether he owed them upon the account of his own affairs, or for other persons for whom he was bound; the duties of the lands and tenements which are part of the inheritance; the debts and other charges of the successions which the deceased may have inherited; the reparation of the damages which he may have been the cause of through some fault, or other means; the funeral expenses; and all other engagements whatsoever, either of the person or the goods of the deceased, which may affect his inheritance, although he has not obliged his heir to them expressly by any disposition.[f]

VII.

2598. *Two Sorts of Engagements of the Deceased, which do not pass to the Heir.* — As we must not comprehend indifferently under the goods of a succession all that may have belonged to the deceased person to whom the heir or executor succeeds, as has been said in the fifth article of the first section; so neither must we indifferently reckon among the engagements of the heir or executor all those which the deceased may have been under: for there are two sorts of engagements which end with the person, and which do not pass to his heirs, as will appear in the two following articles.[g]

VIII.

2599. *The First Sort of Engagements which do not pass to the Heir.* — The first sort of engagements which do not pass to the heirs or executors of the deceased contains certain functions which the public order of society requires that some persons should be engaged in, whether they will or not. Thus, the engagement of those who are called to the offices of sheriff, consul, collector, and to other offices which are called municipal offices, or to the ad-

[f] These charges are easily understood of themselves, and that which may have any difficulty in it shall be explained in its proper place. See the sixteenth article of the first section, and the tenth section of this title.

[g] See the two following articles.

ministration or government of a hospital, or any other endowment of charity, the engagement of a tutor or guardian, the commissions that are appointed for functions which the order of justice makes necessary, such as those persons into whose hands litigious goods are sequestered, and others of the like nature, are so many engagements, the exercise of which ends by the death of the persons who were chosen for the said functions.[h] For they are of such a nature, that the heir or executor may either be incapable of them, or may have some privilege which may exempt him from them. But although these charges do not pass to the heirs or executors, and they cease upon the death of those who are engaged in them, yet the heirs or executors will be liable for the consequences which may regard them, according to the rules which have been explained in another place.[i]

IX.

2600. *The Second Sort of Engagements which do not go to the Heir.* — The second sort of engagements which do not pass to the heirs or executors contains some of those into which people cannot enter but voluntarily, and by mutual consent of all parties, and which are such that the parties concerned choose reciprocally one another upon some considerations which are limited to their persons. Thus, persons who give to their attorneys or agents the charge either of all their affairs in general, or of some affair in particular, and the attorneys or agents who accept of this charge, enter into a voluntary and mutual engagement, by the trust and confidence which they have in one another.[l] Thus, those who enter into partnership together, whether it be a partnership of all their goods, or a particular partnership for carrying on any trade or commerce, form among themselves a voluntary tie or engagement, in prospect of the advantages which they may reap from one another by the industry, fidelity, and other qualities that each of them considers in the other.[m] Likewise those who, having some differences with one another, agree to refer the matter to arbitrators, may perhaps take this way of adjusting matters, only because of the particular friendship, or other considerations, which they may perhaps have

[h] See the fifth article of the sixth section of *Tutors*. See the title of *Syndics, Directors*, &c.

[i] See the fifth, sixth, seventh, and eighth articles of the fourth section of *Tutors*.

[l] See the sixth article of the fourth section of *Proxies*.

[m] See the fourteenth article of the fifth section of *Partnership*.

one for the other.[n] So that in all these cases the engagements of the one towards the other are founded upon motives which are limited to the persons: for which reason it is just that their ties and engagements should end by their death. But their heirs or executors, in the same manner as those of tutors, are bound for all the consequences which may regard them, pursuant to the rules which have been explained in their proper places.[o]

SECTION VII.

OF THE ENGAGEMENTS WHICH MAY BE IMPOSED ON AN HEIR OR EXECUTOR, AND BY WHAT KIND OF DISPOSITIONS.

ART. I.

2601. *Charges which may be imposed on an Heir.* — One may impose on an heir, whether he be heir by testament or heir at law, all those kinds of charges which have been mentioned in the fifth article of the foregoing section, and, in general, all manner of charges without distinction; provided they be possible, honest, and lawful. For whatever is impossible, or contrary to good manners and decency, or is declared to be unlawful by any law, the same can be of no force to oblige any one.[a]

II.

2602. *By what Dispositions the said Charges may be imposed.* — All the charges, in general, which may be imposed on heirs or executors, are regulated by two sorts of dispositions. One is, of those which are called dispositions in view of death, which are revocable, and which have not their effect but by the death of the person who has made the disposition, such as testaments, codicils, and donations made in view of death; which comprehends legacies, fiduciary bequests, substitutions, and whatever else may be ordained by these sorts of dispositions. The other kind is of those which are irrevocable, such as donations which are to have their effect in the lifetime of the donor, and other acts of the same nature, which may contain some engagement that one imposes on

[n] See the sixth article of the first section of *Compromises*.

[o] See the sixth section of *Partnership*, the sixth, seventh, and eighth articles of the fourth section of *Proxies*, and the sixth article of the first section of *Compromises*.

[a] *Nov.* 22, *c.* 2; — *l.* 5, *D. test. quemad. aper.*; — *l.* 185, *D. de reg. jur.*

his heir. Thus, for example, he who in his lifetime should make a donation of a house, or other tenement, may by the same contract charge his heir or executor to suffer after his death a service on another house or tenement, which is part of his inheritance, for the behoof of the said house or tenement which he had made over by deed of gift, not being willing to subject himself to that service during his own lifetime. Thus, one may make a contract for founding a college, or hospital, the execution whereof should not commence till after the death of the founder, although the contract be irrevocable.[b]

III.

2603. *What these Dispositions ought to be.* — To oblige the heir or executor to the performance of the charges which the person to whom he succeeds has a mind to impose upon him, it is necessary that the dispositions by which the said charges are enjoined be such as may have effect. And in order to give them their effect, it is necessary that they be made according to the rules which follow. After which they are in the place of laws to the heir or executor.[c]

IV.

2604. *First Rule, that the Persons who dispose be capable of disposing.* — The first rule for the validity of the dispositions which contain the charges that are imposed on heirs or executors is, that the said dispositions be made by persons who have power to make them, and in whom the liberty of disposing does not meet with any obstacle, by their being under any of the incapacities which have been explained in the second section, or others which shall be explained in their proper places.[d]

V.

2605. *Second Rule, that the Persons who are to receive the Benefit thereof be not incapable of it.* — We may lay it down as a second rule, that the dispositions by which any charge, imposed on an heir or executor, in favor of some person, such as a legacy a fiduciary bequest, and others of the like kind, ought to be made in favor of persons capable of receiving these sorts of benefits.[e]

[b] This is a consequence of the preceding article.

[c] See the following articles.

[d] See the second section of *Testaments*.

[e] We cannot give to those whom the laws have made incapable of receiving. See the second section of *Testaments*.

VI.

2606. *Third Rule, that the Dispositions be made in due Form.* — The third rule is, that the said dispositions be made according to the form prescribed by law. Thus, as to dispositions made in view of death, it is necessary to observe therein the number of witnesses, and the other formalities, which shall be explained in their places.[f] So, likewise, as for dispositions which are to take effect in the lifetime of the parties, it is necessary that they be such as the laws prescribe. As if it is a donation which is to take effect in the lifetime of the donor, it is necessary that it should be accepted by the donee, and registered.[g]

VII.

2607. *Fourth Rule, that the Dispositions do not exceed the Bounds prescribed by Law.* — The fourth rule is, that the charges imposed by the said dispositions do not exceed the bounds which the laws have set to the liberty of disposing, in order to preserve to the heirs, whether they be instituted by testament, or succeed to an intestate, the portion of the goods of the succession which the law has reserved to them. Thus, the testator cannot, by any charge or imposition whatsoever, diminish the legitime of his children or parents. Thus, in the provinces of France which are governed by the Roman law, the testator cannot bequeath above three fourth-parts of the estate which he leaves behind him; and the heir or executor may get the legacies to be reduced, so as that there may remain to him at least one fourth part of the succession. And the fiduciary bequests have likewise their bounds.[h] And in the provinces of France which have their particular customs, one cannot bequeath more than what the said customs allow of.

VIII.

2608. *Difference between that which is defective by the Fourth Rule, and that which is so by the others.* — There is this difference between the dispositions which are defective by one of the first three rules which have been just now explained, and those which are contrary to the fourth; that these are not altogether null for having exceeded the bounds of the liberty which every one has to

[f] See the third section of *Testaments*, and the first section of *Codicils*.

[g] See the second and fifteenth articles of the first section of *Donations*.

[h] See the title of the *Legitime*, that of the *Falcidian Portion*, and that of the *Trebellianic Portion*.

dispose, but are reduced within the said bounds; and that the dispositions which are made contrary to one of the three other rules, that is, either by persons who have not the power of making them, or in favor of persons who are not capable of receiving any benefit by them, or if they are defective in some formality, the want whereof is sufficient to annul them, such dispositions have no effect at all, and are noways obligatory.[i]

IX.

2609. *The Detail of what Particulars relate to these Four Rules shall be explained in its proper Place.* — All these causes, which may either annul testaments and other dispositions, or hinder them from having their entire effect, shall be explained in their proper places.[l] And it is sufficient here to give this short view of these general principles, and to observe their order.

X.

2610. *In what Manner these Dispositions ought to be performed.* — When the charge imposed upon the heir or executor, whether it be a legacy or any other charge, ought to have its effect either in whole or in part, he ought to perform it in the manner prescribed him by the testament or other disposition. And if there arise any difficulties concerning it, they are to be decided by the rules which shall be explained in their proper place.[m]

SECTION VIII.

OF THE ENGAGEMENTS WHICH ARISE FROM THE QUALITY OF HEIR OR EXECUTOR, ALTHOUGH THE PERSON TO WHOM HE SUCCEEDS DOES NOT IMPOSE ANY.

ART. I.

2611. *The Heir is bound for all the Charges of the Inheritance, although they were unknown to the Deceased.* — Every heir, whether he be heir at law or instituted by a testament, who accepts an inheritance, engages himself thereby to all the charges of the in-

[i] This is a consequence of the four preceding articles.

[l] See the places referred to on the fourth, fifth, sixth, and seventh articles.

[m] See the sixth, seventh, and eighth sections of *Testaments*, and the eleventh section of the same title.

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heritance without distinction, and even to those which perhaps the person to whom he succeeds was ignorant of. And as he has all the effects, and all the rights of the inheritance, even those which have fallen to it since the death of the person to whom he succeeds, so he is also bound for all the charges which have happened since the said death.[a]

II.

2612. *For the Charges of the Inheritances which had fallen to the Person to whom he succeeds.* — If, in the succession which passes to an heir or executor, there happens to be other successions which the deceased or his authors had inherited, all the charges of those several successions are confounded and united in the person of this heir or executor, and he becomes liable for them all.[b]

III.

2613. *For the Substitutions or Fiduciary Bequests, with which the Deceased was charged.* — If there are any goods in a succession which are subject to some fiduciary bequest or substitution, with which the deceased or his authors had been charged, the heir or executor will be bound to restore them to the persons who shall appear to have the right to them when the cases thereof shall happen.[c]

IV.

2614. *For all other Charges, Claims, and Demands on the Succession.* — The heir or executor is bound in general, and without distinction, for all the debts owing by the deceased, and for all other kinds of charges whatsoever, and for the claims and demands which creditors or others may have against the deceased, or on the goods of the inheritance.[d]

V.

2615. *For the Damages occasioned by any Offence or Crime of the Deceased.* — We must reckon among the charges for which the heir or executor is bound, although the deceased may have ordered

[a] See the second article of the fifth section, the first article of the sixth section, and the second article of the following section.

[b] See the sixteenth article of the first section.

[c] See the title of *Substitutions*, in the fifth book.

[d] *L.* 2, *C. de hæred. act.* See the following section.

nothing about them, the restitution and satisfaction which the deceased may owe for damages he has done by some crime or offence.[e] This shall be the subject-matter of the tenth section.

VI.

2616. *For the Debts which are payable only after his Death.* — We may likewise place in the same rank the debts which could not be demanded from the deceased during his lifetime; as if he had bound himself for a sum of money which was not to be paid till after his death; or if the person who was surety for him, having paid the debt after his death, demands his reimbursement from the heir or executor, which he could not demand from the deceased.[f]

VII.

2617. *For the Funeral Expenses.* — Lastly, the heir or executor is bound for the funeral expenses of the person to whom he succeeds,[g] which shall be the subject-matter of the eleventh section.

A TABLE OF THE PLAN OF THE RIGHTS AND CHARGES OF HEIRS OR EXECUTORS.

2618. WE must add here, by way of conclusion or recapitulation of this and the three foregoing sections, that, as has been remarked in the preamble to the fifth section, we have endeavoured to lay down in these four sections, as it were in a plan, a general idea of the rights of heirs and executors, and of their engagements, in which one might see them altogether, and in order, without adding the detail of the rules of all those different matters which ought to be explained in different places. And it is now necessary that we should subjoin here a summary view of the said rights and engagements, as it were in a table of the said plan, and there mark the places where the particular rules relating to each matter are to be met with. Some may, perhaps, think that it would have been more proper to have placed this table at the head of the fifth section, immediately after the remark which is there made; but we have judged it more convenient that we should first explain the said rights and engagements, in order

[e] See the tenth section.

[f] *L. 7, D. de reb. auth. jud. possid.; — d. l. in f.*

[g] See the eleventh section.

to avoid confusion and obscurity, being persuaded that this table will be more easily understood here, after the reading of those four sections, than it would have been had it been placed before them.

The Rights of Heirs and Executors, and the Places where they are treated of.

1. The right of accepting or renouncing the inheritance, which includes the right of deliberating. See the first section of the second title of this first book, and the third title of the same book.

2. The right of accepting the succession with the benefit of an inventory. See the second title of the same book.

3. The right of a legitime, for the heirs to whom it is due. See the third title of the third book.

4. The right of getting the legacies, fiduciary bequests, and substitutions reduced to what is regulated by the law. See the third title of the fourth book, and the fourth title of the fifth book.

5. The right of selling, or making over by deed of gift to others, the inheritance, or disposing of it otherwise. See the seventh article of the thirteenth section of this title, the second article of the fourth section of the *Contract of Sale*, and the twenty-fourth and twenty-fifth articles of the tenth section of the same title.

6. The right of transmitting the succession to their heirs. See the tenth section of *Testaments*.

7. The rights of coheirs to come to a partition of the inheritance among them. See the fourth title of this first book.

8. The right of accretion among the coheirs. See the ninth section of *Testaments*.

9. The right of collation of goods among coheirs. See the fourth title of the second book.

10. The right of reversion to those who ought to have it. See the third section of the second title of the second book.

Charges imposed upon the Heir or Executor by the Will of the Person to whom he succeeds, and the Places where they are treated of.

1. The charge of paying the legacies. See the second title of the fourth book.

2. The charge of restoring fiduciary bequests. See the said second title of the fourth book, and the third title of the fifth book.

3. The charge of executing all the other dispositions of the per-

son to whom the heir succeeds. See the eleventh section of *Testaments*, and the title of *Legacies*, and that of *Substitutions*, both direct and fiduciary.

Charges of the Heir or Executor which are independent of the Will of the Person to whom he succeeds, and the Places where they are treated of.

1. The charge of acquitting the debts due from the succession, and whatever else may be due from the heir or executor. See the following section.

2. The charge of acquitting the damages occasioned by any crime or offence of the person to whom the heir succeeds. See the tenth section of this title.

3. The charge of acquitting the funeral expenses. See the eleventh section of this title.

SECTION IX.

IN WHAT MANNER THE HEIRS OR EXECUTORS ARE BOUND FOR THE PASSIVE DEBTS, AND FOR ALL THE OTHER CHARGES OF THE INHERITANCE.

2619. ALTHOUGH all the articles of this section make mention of no other charges in particular besides the passive debts, that is, the debts owing by the deceased, yet the rules which are here explained ought to be applied to the other sorts of charges, such as legacies of different kinds of things, funeral expenses, and all others. For there are none of them which may not be converted into passive debts by reducing their estimation to a certain sum of money, if the heirs or executors fail to acquit them.[a] Thus, the rules of this section are common to all the kinds of charges of an inheritance, according as they may be applied to them.

ART. I.

2620. *Divers Kinds of Charges.* — We must comprehend under these words of passive debts and charges of an inheritance which the heir or executor is bound to acquit, not only all that was owing by the deceased upon his own account, and all that which

[a] *L.* 72, *D. de verb. obl.* See the first article of the eighth section of *Legacies*.

he has imposed on his heir or executor, but, in general, all the rights which may affect the inheritance.[a]

II.

2621. *The Heir is bound for the Debts, although they exceed the Value of the Goods of the Inheritance.* — The heir or executor who accepts the inheritance purely and simply, that is to say, who does not take the benefit of an inventory, of which mention has been made in the fifth article of the fifth section, is bound indefinitely and without distinction for all the debts owing by the deceased, and for all the other charges of the inheritance, whatever sum they may amount to, and although they exceed very far the value of the goods of the inheritance. For it depended only on him, either not to accept the succession at all, or to take the benefit of an inventory. And having entered to the inheritance without this precaution, he has engaged himself irrevocably for all the charges, whatever they are.[b]

III.

2622. *Three Sorts of Debts, those which are merely Personal, those which have a Mortgage, and those which are Privileged.* — The engagements of heirs or executors for the passive debts are different, according to three different kinds of debts. The first is of those which are called purely personal: the second is of those which have a mortgage for their security: and the third is of those which are privileged. We must distinguish these three different sorts of debts, in order to distinguish likewise the rights of the creditors against the heir or executor, and the different engagements which the heir is under to the creditors.[c]

IV.

2623. *Definition of these Three Kinds of Debts.* — The purely personal debts are those which consist only in a bare promise, or other title or security, which obliges only the person of the debtor,[d] without having any mortgage or privilege on any part of his estate. The hypothecary debts are those for the security of which

[a] All these different charges are acquitted by the heirs according to the rules which shall be explained in this section.

[b] *L.* 8, *D. de acquir. vel omitt. hæred.*

[c] See the following articles.

[d] § 1, *Inst. de act.*; — *l.* 25, *D. de oblig. et act.*

the creditor has a mortgage.[e] And the privileged debts are those which have some of the privileges that have been explained in the fifth section of *Pawns and Mortgages.*

V.

2624. *Preference of the Creditors of the Deceased to those of the Heir, in the Goods of the Inheritance.* — The creditors of the deceased for debts purely personal, such as those who are called creditors by bond or note, that is, who have only a bare promise under the debtor's hand, and in general all those who had no mortgage on the estate of the deceased, their debtor, are nevertheless preferred in the goods of the deceased before the creditors of the heir or executor, even although they may have mortgages for the security of what is owing to them. For although the goods of the deceased be mortgaged to the creditors of the heir, if he had mortgaged to them all the goods which he should acquire for the future, yet the goods of this inheritance are, in the first place, appropriated for the payment of the debts of the deceased, and have been transmitted to the heir only upon this condition, that he should acquit the debts. And it is still with much greater reason that the creditors of the deceased are preferred who have a mortgage or privilege on those very goods.[f]

VI.

2625. *Preference of the Creditors of the Heir to those of the Deceased, in the Goods belonging to the Heir.* — The creditors of the deceased, even those who have mortgages for the security of their debts, have no mortgage on the proper goods of the heir or executor, until he either engages his estate to them, or they get a sentence of condemnation against him. But this mortgage, which they may have on the estate of the heir, will take place only after the mortgage of the proper creditors of the heir to whom he had engaged his estate before. For the deceased who was their debtor neither did nor could give them a mortgage on the estate of his heir.[g]

VII.

2626. *Creditors who have neither Mortgage nor Privilege share equally in Proportion to their Debts.* — When there are several cred-

[e] See the second article of the first section of *Pawns and Mortgages.*

[f] *L.* 6, *D. de separat.* See the ninth article.

[g] *L.* 29, *D. de pign. et hypoth.*; — *l.* 1, *in f. C. comm. de legat.*

itors of the deceased, who have neither mortgage nor privilege for their debts, they come in share and share alike, both in the goods belonging to the heir, and in those which belonged to the deceased, and every one receives his share of them in proportion to his debt, if there are not goods enough to satisfy the whole debts.[h]

VIII.

2627. *The Creditors of the Deceased come in all alike on the Goods of the Heir.* — If there are creditors of the deceased who had mortgages, they are paid out of the effects which belonged to their debtor, according to the order of their mortgages; but if the goods of the deceased are not sufficient to acquit them, and they come upon the goods of the heir for their payment, in that case they come in jointly with the other creditors of the deceased who had no mortgage. For they have all of them their right against the heir only from the same time, and from the day that he accepted the inheritance. But the creditors of the deceased, whether they had mortgages or no, who first get a mortgage on the estate of the heir, whether it be that he engages himself to them in this manner, or that they obtain judgment against him, will be preferred before the others in the goods belonging to the said heir.[i]

IX.

2628. *Separation of the Goods of the Inheritance from those of the Heir.* — In all the cases where there is a competition between the creditors of the deceased and those of the heir, all the creditors of the deceased are preferred in the goods which belonged to the deceased before all the creditors of the heir. And in order to their exercising of their right, they may demand a separation of the goods of the inheritance from those which belong properly to the heir.[l]

[h] *L.* 1, § *ult. D. de tribut. act.* See the second section of the *Cession of Goods.*

[i] *L.* 2, *in f., l.* 4, *C. qui potior; — l.* 11, *D. eod.* See the two preceding articles. We must not confound, in this article, the right which the creditors of the deceased have against the heir, with the mortgage which they have on the estate of the heir. For all the creditors of the deceased, whether they had mortgages from the deceased or not, acquire their right against the heir the very moment that he accepts the inheritance, as is said in the article; but they have each of them their mortgage on the estate of the heir only from the time that he obliges himself to them in this manner, or that he is condemned by a sentence.

[l] *L.* 2, *C. de bon. auth. jud. possid.* See the title of the *Separation of the Goods of the Deceased*, &c. The creditors of the heir have the same preference on their part as to the goods belonging to the heir, and may demand this separation, as has been remarked in the preamble to the same title of the *Separation of Goods.*

X.

2629. *The Heirs are bound personally for their Portions in the Inheritance, and such of them as have the Goods which are mortgaged for a Debt are bound for the whole Debt.* — When there are two or more heirs, the creditors of the deceased ought to divide their demands against every one of them according to the portions they have in the inheritance, and they cannot sue any of them for the portion of the debt that falls to the share of the others, nor can they demand the whole debt from any one of them alone. But as for the debts which are secured by a mortgage, or which have a privilege, the creditors may demand their payment out of the effects which are subject thereto, although they have fallen to the lot of any one of the heirs singly. And this is what is meant by the common saying, *that the heirs are bound for the debts of the succession personally every one for his proportion, and hypothecarily for the whole.*[m] Thus, the creditors preserve their rights entire on the inheritance, for they exercise their mortgage and their privilege on the goods which are subject thereto; and they use their right against all the other goods of the succession, having an action against every one of the heirs according to the share which they have in the inheritance.

XI.

2630. *The Debt secured by Mortgage or Privilege is divided with Respect to the Heirs.* — Although the debt which is secured by a mortgage or privilege is not divided with respect to the creditor, and he may demand the whole from the heir who is in possession of the goods which are subject to it, yet the debt is divided among the heirs; and he who, being in possession of the effects which are subject to the mortgage or privilege, has paid the whole debt, or is sued for payment of it, shall be indemnified by his coheirs, as shall be shown in the article which follows.[n]

XII.

2631. *How all the Debts are divided among the Coheirs.* — All the debts, whether they be barely personal, or secured by a mortgage or privilege, are divided among the heirs, so as that each of

[m] *L.* 2, *C. de hæredit. act.*; — *l.* 33, *D. de legat.* 2. See the twelfth and fifteenth articles of this section, and the sixteenth article of the first section of *Pawns and Mortgages*.

[n] This is a consequence of the foregoing article. See the following articles, and the sixteenth article of the first section of *Pawns and Mortgages*.

them ought to bear his part thereof according to the share he has in the inheritance, unless it be that one of the heirs has been charged by the deceased to acquit the whole debt, or to pay more than his proportion of it. Thus, the heir who is sued for more than his proportion of a debt which is purely personal cannot be condemned to the creditor for more than his share amounts to. For, with regard to the heirs, it would not be just that one of them should be bound to pay the portion of the other. And as for the creditor, he is at liberty to seize upon the whole estate before any of the heirs take their portions out of it, and if he does it not, it is but just that the security which he had on all the goods of the deceased for his whole debt should follow the said goods, and be divided according as they are divided. But as for the debts secured by a mortgage or privilege, as it is just that the creditor should preserve his mortgage or his privilege, so he may either exercise his right on the effects which are subject to it, or, without derogating from his security, he may sue each heir for his portion. And if the heir who is in possession of that part of the estate which is subject to the mortgage or privilege is sued for the whole debt, he may have his recourse against his coheirs, who shall indemnify him, every one according to his share.[o]

XIII.

2632. *The Debts are divided among the Coheirs, even against the Exchequer.* — The liberty which the heirs have, of dividing among them the debts which are purely personal, hath its effect with respect to all sorts of creditors whatsoever, and even against the exchequer.[p]

XIV.

2633. *The Insolvency of one of the Heirs does not hinder this Division.* — The same liberty of dividing the debts purely personal among the coheirs hath its effect even in the case where one of them may prove insolvent. For the creditor ought to blame himself for not having taken his security on the whole goods of the succession before they were divided among the coheirs.[q]

[o] *L.* 2, *C. si unus ex plur. hæred. credit.* See the fifteenth article.
[p] *L.* 2, *C. de hæred. act.*
[q] *L.* 33, *D. de legat.* 2.

XV.

2634. *The Debts are divided according to the Portions of the Inheritance.* — Seeing the debts are divided among the coheirs according to the shares which they have in the inheritance, it is therefore upon this foot that each of them pays his proportion of them; and although it may happen among coheirs, that besides their hereditary portions, whether they be equal or unequal, there is some legacy or other advantage left to one more than to the others, yet he will not be charged with the debts but in proportion to the share which he has in the inheritance.[r]

SECTION X.

OF THE ENGAGEMENTS OF THE HEIR OR EXECUTOR, ON ACCOUNT OF CRIMES AND OFFENCES COMMITTED BY THE PERSON TO WHOM HE SUCCEEDS.

2635. Although the principal rules of the engagement of heirs or executors for the crimes and offences of those persons to whom they succeed are different according to our usage from what they are in the Roman law, yet it was not proper to leave out this matter entirely, it being such an essential part of the matter of successions, and the rules thereof being of such a necessary and frequent use.

2636. In order to understand aright the difference between the Roman law and ours in this matter, and to know what are the rules of the Roman law which we retain, and those which we reject, it is necessary to observe the principles thereof, which follow.

2637. It appears from the laws of the Digest, and those of the Code, which relate to this matter, and which are scattered up and down in divers places, that, in relation to the condemnation of the heirs of those who were guilty of crimes and offences, they made one first general distinction between offences which were called private, in which every one could sue only for his own particular interest, such as theft, injury, and some others, and the crimes which they called public, because all persons were admitted to prosecute the offender, in order to bring him to condign punish-

[r] *L.* 1, *C. si certum pet.* See the twelfth article.

ment, and even those who had suffered no damage thereby, such as the crimes of high treason, parricide, sacrilege, and others.[a]

2638. As to private offences, they distinguished in them the satisfaction which was to be made to the person who had suffered the damage, and which is commonly called the civil interest, from the pecuniary penalties to which the offender was obnoxious, over and above the reparation of the damage. Thus, for example, in theft, when he whose goods were stolen did not prosecute the thief in the extraordinary manner by an accusation, that is to say, criminally, as he might have done if he had pleased,[b] and he sued him only in a civil action, that is, for his civil interest, or the damage which he had sustained, and not for the punishment of the crime which regards the public; the reparation that was due to the injured party consisted in the restitution of the thing which was stolen, or of its value, with damages, and he had over and above for the pecuniary penalty the quadruple of the value of the thing stolen, if the thief was taken in the act, or the double if he was not taken in the act.[c] They distinguished likewise between the cases where there had been an action brought against the person who was guilty of the offence in his lifetime, and those where the action was only commenced after his death against his heir. According to these distinctions, when the offender had been cited into judgment in his lifetime, if he happened to die before sentence passed against him, his heir was condemned, not only to make reparation of the damages, but also to pay the pecuniary penalty, according to the nature of the offence, as the double or quadruple in the case of a theft; and it was judged that the deceased, having been prevented by an action which in the event appeared to be well founded, had incurred the penalty, and that the heir ought to pay it. But if there had been no action brought against the deceased, and it was only begun against the heir, in that case he was not liable to the pecuniary mulct.[d] And as for the reparation of damages, they made another distinction between the case where the heir of the offender, who was not sued in his lifetime, reaped some advantage from the offence, as if

[a] § 1, *Inst. de publ. jud.*

[b] *V. l. ult. D. de furt.*; — *l.* 15, *D. de condict. caus. dat.*

[c] § 5 *et* § *ult. Instit. de obl. quæ ex delict. nasc.*

[d] *L.* 33, *D. de obl. et act.*; — *l.* 58, *eod.*; — § 1, *in f. Inst. de perpet. et tempor. act.*; — *l.* 164, *D. de reg. jur.*; — *l.* 139, *eod.*; — *l.* 87, *eod.* Seeing the heir of him against whom an action was commenced in his lifetime was obliged to pay the pecuniary mulct, he was with much more reason bound to make reparation for the damage.

the thing stolen was still in being, and in his possession, or if the inheritance was anyways augmented thereby, and the case where the inheritance was noways bettered by it. In the first case, the heir who reaped advantage from the offence was bound to restore all the clear profit which he had thereby; and in the second case, the heir having no advantage by the offence, he was not bound to make any restitution.[e]

2639. As for the public crimes, seeing there are two sorts of punishments, those which affect the person of the offender, such as are all corporal punishments, the deprivation of an office, and others of the like nature, and pecuniary punishments, such as fines and forfeitures,[f] and seeing it is only the punishments of this second kind that can pass to the heirs, the Roman law made this difference between the pecuniary punishments of private offences and those of public crimes; that as to the former, the heirs, as has been already mentioned, were liable to them if the action was begun against the offender himself in his lifetime, although he died before sentence of condemnation, because the death of the offender in this case did not extinguish the action for the offence. But as for the pecuniary punishments of public crimes, they did not fall upon the heirs, unless there had been a sentence of condemnation against the deceased; and although there had been an accusation lodged against the offender, yet if he died before condemnation, as his death extinguished the crime itself, so likewise its consequences did not subsist any longer.[g] There were only two sorts of crimes excepted, for which the criminals were prosecuted even after their death. One was the crime of high treason,[h] and the crime of those persons who, to prevent their condemnation, made way with themselves.[i] The other sort was of those crimes, the prosecution whereof regarded chiefly a pecuniary interest, such as the embezzling of the public money, extortion, and the crime of those persons who, having been intrusted with the administration of the public money, detained part of it in their hands.[l] In the two crimes of the first sort, it was

[e] *L. 38, D. de reg. jur.; — l. 26, D. de dolo; — l. 44, D. de reg. jur.; — l. un. C. ex delict. def. in quant. hæred. conven.; — v. l. 2, § ult. D. vi bon. rapt.; — v. l. 4, in f. D. de incend. ruin. naufr.; — l. 2, § ult. D. vi bon. rap.*

[f] *L. 20, D. de accusat.; — l. 1, in f. D. de pœnis.*

[g] *L. 20, D. de accusat.; — l. 2, C. ad. leg. Jul. repet.*

[h] *V. d. l. 20, D. de accusat.; — l. ult. D. ad leg. Jul. maj.*

[i] *L. penult. C. si reus vel accus. mort. fuer.; — toto tit. C. de bon. eor. qui mort. sibi consc.*

[l] *L. ult. D. ad leg. Jul. pecul.*

the nature of the crime itself which demanded the prosecution thereof after the death of the criminal; and in the other crimes of the second sort, it was the quality of the effect of the crime which caused a loss that was necessary to be repaired. And it was for the same reason that, in some other crimes, the consequence of the pecuniary interest made it necessary to sue for the said pecuniary interest even after the death of the offender. Thus, in the crime of adultery, seeing the husband of the wife who was found guilty of this crime had a right to his wife's portion, and that the heir of the wife could not demand it back of the husband, he was allowed to bring proofs of his wife's adultery, even after her death.[m] Thus, the heir was sued in relation to the confiscation of merchandise which the exchequer had acquired a right to on account of the crime of the deceased, who had defrauded the public of the customs due for the said goods.[n] Thus, in the case of an heir who had neglected to prosecute the murderers of the person to whom he had succeeded, seeing the said inheritance was for that reason forfeited to the exchequer, this pecuniary interest therefore was the cause why the said heir was prosecuted for this neglect even after his death.[o] Thus, in the crime of forgery, it was necessary, after the death of the party accused, to prove the crime, in order to recover against the heir the profit which he had made by the forgery.[p] And in these and the like cases, seeing, after the death of the party accused, the prosecution was not for personal punishments to be inflicted on the person of the offender, but only for the pecuniary interest; the cognizance thereof was therefore in that case taken away from the criminal judge, and left to the determination of the judge who had cognizance of the civil interest, that being the single matter in question after the death of the offender.[q] We may further observe, in relation to this subject, that there was in the Roman law another sort of crime, for which the son of the offender was prosecuted, even although he was not heir to his father. It was the case where an officer of the army, who was intrusted with the money appointed for the subsistence of the soldiers, died, having part of the said moneys in his hands which he had not accounted for.[r] And this was so established, because of the great importance it was to the public that such moneys should be secure; and it is not improbable but that this law may

[m] *L. ult. C. ad leg. Jul. de adult.*
[n] *L. 8, D. de publican.*
[o] *L. 22, D. de senat. silan.; — l. 9, D. de jure fisci.*
[p] *L. 12, D. de lege Corn. fals.*
[q] *L. 6, D. de publ. jud.*
[r] *L. ult. C. de Primipilo.*

have been founded on the presumption that the children of this officer had reaped the benefit of the money, which had been thus diverted from its true use, and upon a kind of equity in making the children as it were sureties for their fathers in a debt that is so singularly privileged, because of the benefits and advantages which the children have received from their parents, even those who refuse to enter heirs to them: and the said law may likewise have had this for its motive, to engage parents not to be guilty of an infidelity which might be punished in the person of their children. As to which it may be observed, that, both in the Roman law and in the usage of France, there are crimes of which even some personal punishments pass to the children of the criminals, as in the crime of treason and embezzlement of the public money.[s]

2640. We must further observe upon what has been said concerning the punishment of crimes, that in the Roman law we must not confound capital crimes, that is, those which are punished by natural or civil death, with those crimes which were called public. For there were capital crimes which were not public, that is to say, the accusation whereof was not permitted to all persons indifferently; and there were likewise some public crimes which were not capital; which it is necessary to take notice of, in order to obviate some difficulties which might perplex those who, not being sufficiently instructed in these principles, might have a mind to inform themselves more fully in the body of the Roman law of all this detail, which it would be needless to explain here.

2641. To conclude these remarks on the Roman law touching this matter, we shall only add, that as for the civil interest, and the reparation of the damage occasioned by all other crimes, except those in which the principal concern was a pecuniary interest, as has been just now explained, the party accused happening to die before his condemnation, the crime was extinguished; and although he had been accused before his death, yet his heir, who reaped no benefit by the crime, was not liable to make any satisfaction; but it was thought sufficient to hinder the heirs of the offenders, and of their accomplices, from reaping any benefit thereby.[t]

[s] *V. l. 5, C. ad leg. Jul. majest.* See the ordinance of *Blois*, art. 183, and that of *Francis* I., in March, 1545, art. 1.

[t] *L. 5, D. de calum.; — l. un. C. ex del. def. in quant. hæred. conven.* See the last of the texts cited under the letter *e*.

2642. According to the usage in France, which is partly conformable, and partly opposite, to the Roman law, the heirs are never subject to the pecuniary punishments which we call fines, nor to forfeitures, except when there is a sentence of condemnation against the deceased from which there lies no appeal, even although the accusation had been brought against the offender in his lifetime. And all prosecutions for crimes cease by the death of the party accused, unless it be the crime of treason, whether it be against God or man, duelling, self-murder, even although there was no precedent crime, and rebellion against justice with open force, if the person accused was killed in the scuffle.[u] But as for the civil interest, and the reparation of the damage occasioned by a crime or offence, the heirs of the person who has caused the damage are bound for it indifferently, whatever nature the crimes and offences be of, and without any distinction between the cases where the deceased himself has been judicially accused and prosecuted, and the cases where the action has been brought only against the heir: and likewise without distinguishing between the cases in which the heir has some benefit from the crime or offence, and those where he reaps no manner of advantage.

2643. This law is so natural and so just, that it seems strange that any persons should have followed other rules. For although an heir does not reap any manner of profit from the crime of the person to whom he succeeds, and there has been no accusation nor any action commenced against the deceased for the damage which he had caused; yet it is enough to oblige the heir to repair the damage, that he succeeds to all the effects of the deceased; seeing he is by that means bound for all the charges, and that the said goods, which, being in the possession of the deceased, were to be responsible for all his engagements, of what nature soever, cannot pass but with this condition to his heir, who succeeds in the place of the deceased, and represents him. And if it is just to reckon among the charges of an inheritance, not only all those for which there were express titles against the deceased, such as obligations, promises, and others of the like nature, but likewise all those charges of which there was no title at the time of his death, provided only that they can be verified by such proofs as the law admits, it is likewise equally just to

[u] See the first article of the twenty-second title of the ordinance of the month of August, 1670.

reckon among those charges the obligation which is contracted by him who causes any damage by a crime, or an offence, seeing he obliges himself as effectually by his deed as by his word. And if his will engages him when he makes a promise, or obliges himself to any one for just causes, and which turn only to the advantage of those to whom he becomes bound, it engages him much more when he does any harm or damage, since by that he obliges himself, not only to the person to whom he does the damage to repair it, but he likewise engages himself towards the public to suffer the punishment which his crime or offence may deserve. So that, of all the ways in which it is possible for one to oblige himself, the validity of none of them does so much concern both the public and private persons, as does that of the engagement into which one enters by the commission of crimes or offences; since it is of infinitely greater importance to the society of mankind, and to the particular persons who suffer the damages occasioned by crimes and offences, that the said damages should be repaired as much as possible, than it concerns either the public, or private persons, that other engagements, even the most lawful, should be performed.

2644. It follows from these truths, which may be ranked among the first maxims of equity, that the heir, who by virtue of this quality, being in possession of all the goods of the inheritance, is bound for all the engagements of the person to whom he succeeds, cannot be discharged from the obligation to repair the damages which the deceased has caused by his crimes or offences, neither under pretext that there accrues no benefit to the said heir, nor because there has been no condemnation, accusation, or action against the deceased. For as to the pretext of the heir's not having reaped any advantage, besides that in the crimes where the deceased did reap profit, such as that of robbery, theft, forgery, or others of the like kind, although the things themselves that were thus unlawfully acquired by the deceased are not perhaps extant in the inheritance; yet it is reasonable to presume that the inheritance has been thereby increased, since it may contain some goods and effects which have been purchased with the moneys got by the theft or robbery. And although the offence committed by the deceased were of such a nature as never to have yielded any profit, such as the setting a house on fire, murder, or other crime of the like kind, yet the advantages which the heir reaps by the goods of the inheritance are to him in lieu of a profit,

which was bound for the reparation of the damages occasioned by the crime or offence of the person whose estate he has: and this engagement ought not to be distinguished from the others. And as to the case where there has been no demand made against the deceased, it is true, that where the reparation of the damage has not been demanded from the deceased, but only from his heir, this circumstance may serve to acquit him, if the demand was not made until a long time, or some time at least, after the death of the person who had committed the crime or offence, and who was never prosecuted for it, although he lived some considerable time after he had committed the crime. For in this case the delay may have proceeded from fear lest the deceased should have been able to justify himself, if the action had been brought against him, or the prosecution begun, during his life: and it is by the circumstances that one ought to judge of the effect which this delay ought to have. But since it may readily fall out that the person who has done some damage by a crime or an offence dies before any action can be brought against him, and that it may happen, likewise, that for a long time the author of the crime or offence was unknown; these, and such like circumstances, may be just reasons for the excusing the delay of the person who has suffered the damage, and who has brought his action only against the heir of the person who did it. Thus, it is with very good reason that our usage has rejected the general and indefinite rule which acquitted the heir from the demand of reparation of damages, when it was brought only against him, and when it appears that he has not reaped any benefit from the act of the deceased who caused the damage. And it is likewise the usage with us, that in cases where actions for the civil interest, even in capital crimes, are brought only against the heir, and have not been adjudged against the deceased, the heir is obliged either to make good the damage or to justify the deceased, that is, to vindicate his memory. So that our law is in one sense less indulgent to heirs than the Roman law, with respect to the reparation of damages; and it is, on the contrary, less severe in another sense, in regard to pecuniary punishments, to which the heir is not liable according to our usage, not even for bare offences, unless sentence of condemnation has passed against the deceased. And both the one and the other of these two rules, which are directly opposite to those of the Roman law, are founded on the principles of equity, which on one side, as to what concerns the reparation of damages,

obliges the heir to perform the engagement under which the deceased was to repair the damage which he had done, and which on the other side, in what relates to fines or pecuniary punishments, frees the heir from a punishment which ought to be purely personal against the author of the crime or offence, and which ought not to pass to the heir, except after that a sentence of condemnation passed against the deceased has constituted it a debt which may be demanded, and made it a charge or burden of the inheritance. But if the offender dies before his condemnation, the prosecution ceases with respect to all punishments, unless it be in those crimes which are punishable by law after the death of the offenders, as has been already observed.

2645. These rules of our usage, which charge the heirs with the civil interest and restitutions due on account of crimes and trespasses committed by those persons to whom they succeed, whether there has been any demand made against the deceased, or that it has been made only against the heir, and whether the heir have reaped any benefit by the crime of the deceased, or not, are likewise conformable to the canon law, which obliges the heirs to make restitution and reparation of damages without these distinctions.[x] So that these rules being equally agreeable to the laws of the church and of the state, and also to the law of nature, we have thought proper, notwithstanding they are different from the rules of the Roman law, to rank them in their order in this section, which is their proper place; it being noways inconsistent with the design of this book, which is to give us upon each particular matter all the several rules that are conformable to the law of nature and to our usage. We may likewise observe in relation to the engagements of heirs for the crimes and trespasses of those to whom they succeed, that the lawyer Julian, one of the most renowned authors of the laws of the Digest, was of opinion that the heir of a judge, who had taken money or some present, or been guilty of some other misdemeanour in the execution of his office of a judge, was accountable for the same. But the opinion of this lawyer, agreeably to our principles and to equity, was rejected by all the other lawyers; and it has been taken notice of in the body of the Roman law, only to show that Julian was the only lawyer who was of this opinion.[y]

2646. We shall add, by way of conclusion, two reflections on

[x] See the third article.

[y] *L.* 15, § 1, *et l.* 16, *D. de judiciis.*

the Roman law concerning this matter. One arises from the remarks which have been made upon the several cases where one might, pursuant to the principles of the said law, sue the heirs for reparation of damages in certain crimes, although there had been no accusation brought against the offender, because the principal matter in dispute was in relation to a pecuniary interest. It may be said of this rule, that if it was just when this pecuniary interest was the principal matter in question, it was no less just in an action where a pecuniary interest was still demanded, although the demand of the said interest was joined with some other principal matter, of which the pecuniary interest was only an accessory. For the reality in a pecuniary interest, whether it be as a principal or as an accessory, is equally essential to him who suffers the loss. And the nicety which distinguishes between these two ways of considering this interest, either as a principal or as an accessory, can never be a just principle to favor the heir, and ruin him who suffers the loss.

2647. The other reflection relates to another principle of the Roman law, according to which, even in those cases where the pecuniary interest of the person who suffers the damage is an accessory, yet the heir of him who has caused the damage is nevertheless answerable for it. It is in all the cases of the several engagements, whether they be contracted by covenant or any other manner of way, in which there is fraud or deceit, by which one suffers some loss or damage. In all these cases the heir was liable for the damage.[z] Thus, the heir of a person into whose hands any thing was deposited was accountable for the fraud of the deceased, who, in breach of the trust committed to him, had either embezzled or damaged the thing which was deposited with him. Thus, the heir of a tutor was obliged to repair the damage which the tutor had caused to the minor by any misdemeanour during the tutorship. Thus, the heir of him who had sold one thing for another, or some merchandise that was adulterated, was bound to make good the damage which the buyer might suffer by the said fraud. And it appears from the last of the texts cited here, that the engagement of the heir in these sorts of cases was founded on this, that there was a fraud committed against the faith of a contract; as if it were not equally just to punish the iniquities, the violences, the crimes, and to repair the damages oc-

[z] *L.* 49, *D. de oblig. et act.*; — *l.* 12, *eod.*; — *l.* 7, § 1, *D. depos.*

casioned by them, which destroy the general engagement that is contracted among mankind in general by the union which forms their society, as to punish and repair the infidelities which are contrary to the particular engagements of covenants, and as if the precept of doing harm to no person were not universal, and for all sorts of cases without distinction. Since, therefore, there can be no person who is not bound to all others in all the duties which the society that unites all mankind together does require;[a] it follows, that the same duty which obliges heirs to repair the damages which the person to whom they succeed may have caused, when the deceased was obliged by some particular engagement, lays them under no less an obligation to repair the damages occasioned by acts which are a violation of the general engagement of doing harm to no mortal whatever.

ART. I.

2648. *We must distinguish between the Pecuniary Punishment and the Civil Interest.* — In all the cases where the question is concerning the engagement of an heir for the crimes and offences of the person to whom he succeeds, it is necessary to distinguish that which concerns the punishment inflicted on account of the public interest from the reparation of the damage which the crime or offence may have occasioned. Thus, corporal punishments, and pecuniary punishments,[a] which are called fines, regard the public interest: and the restitutions, and the satisfaction which is made for the losses and damages sustained, relate to the reparation that is due to the persons who have suffered the damage.[b]

II.

2649. *How the Heir may be liable to the Pecuniary Punishment.* — When the question relates to the pecuniary punishment, and there has been no sentence of condemnation passed against the deceased, the heir cannot be liable thereto, unless he has been an accomplice in the crime or offence. For this punishment regards only the person who has deserved it, and his death prevents his condemnation. But if there had been a sentence of condemnation against the deceased, the pecuniary punishment in which he

[a] *Ephes.* iv. 25; — *Ecclus.* xvii. 14.

[a] *L.* 20, *D. de accusation.*; — *l.* 1, *in f. D. de pœnis.*

[b] *Inst. vi bon. rapt.*; — § 15, *Inst. de obl. quæ ex delict. nasc.*; — *l.* 13, *D. ratam rem haberi.*

had been condemned would be a charge and debt on the inheritance, which the heir would be bound to acquit, as well as the other debts.[c]

III.

2650. *The Heir is always bound for the Civil Interest.* — When the question is about the reparation of damage caused by some crime or offence, whether the succession of the offender has been increased thereby or not, his heir will be bound to make it good, although there had not been any action or prosecution commenced against the deceased;[d] provided that the fact be proved in the manner that is usually observed in the like cases.[e]

[c] *L.* 20, *D. de accusat.* Although this text relates only to public crimes, yet, according to the usage in France, the rule is common to all offences, as has been mentioned in the preamble.

[d] *L.* 13, *C. de contr. et commit. stipul.*; — *l.* 2, *in fine*, *C. de fruct. et lit. exp.*; — *l.* 11, § 2, *in fine*, *D. de publ. in rem act.* Although these texts relate to other matters, yet they may be applied here, seeing they have relation to that truth of the law of nature, that the heir is bound for the act of the deceased to whom he succeeds. And because this is the rule observed with us in conformity to the canon law, and that we prefer it to the Roman law which is contrary to it, we have set it down in this article, judging it more expedient, for the reasons which we have explained in the preamble, to place this rule among the others, and to support it with those texts out of the civil law, and likewise with these which follow, taken out of the canon law, rather than to leave a matter of this consequence in doubt. 16, *q.* 6, *c.* 3, *v.* 12, *q.* 2, *c.* 34, *c.* 3, *extr. de pign.*; — *c. ult. de sepult.* In litteris tuis continebatur, quod cum H multis fuisset criminibus irretitus, qui ecclesiarum incendium, diabolo instigante, commiserat, tandem in ægritudine constitutus, accepta pœnitentia de commissis per manum Capellani sui fuit a sententia anathematis absolutus: sed moriens ecclesiasticam sepulturam habere nequivit. Quapropter, si ita res se habet, mandamus ut corpus ejusdem, appellatione cessante, facias in cœmeterio sepeliri: et hæredes ejus moneas, et compellas, ut his quibus ille per incendium, vel alio modo, damna contra justitiam irrogaverat, juxta facultates suas, condigne satisfaciant, ut si a peccato valeat liberari. *C.* 5, *de raptor. et incend.*

It appears by these texts, that not only there is no mention made in them of the distinctions of any action brought against the deceased, or of the case in which the heir has reaped some profit, but that this last text obliges the heirs to repair without any distinction all the damages which the deceased may have caused, which implies likewise the duty of inquiring into the damages, in order to make reparation. And we see by the case of burning of churches mentioned in this chapter, that it is no matter whether the heir reaps any benefit by the crime of the deceased or no.

[e] When an action for the civil interest and for reparation of damages is brought against the heir of a person who, having committed the crime or offence, dies before he is prosecuted or condemned, the plaintiff is nevertheless admitted to prove the crime or trespass, and the heir on his part is likewise received to vindicate the memory of the deceased, that is, to justify him from the accusation, if there be occasion for it, either by showing that the proofs of the accusation are not sufficient, or by matters of fact which may justify the deceased, and prove his innocency, and free the heir from being condemned in the civil interest, or reparation of the damages in question.

SECTION XI.

OF FUNERAL CHARGES.

2651. We have explained in the sixth section what are, in general, the different sorts of charges to which the heir may be liable, such as the debts owing by the deceased, restitutions, legacies, funeral expenses, and others. And seeing every one of the said charges contains a detail of several particulars, which ought to be set down in their proper places, we shall treat of legacies, of fiduciary bequests, and of substitutions, in the fourth and fifth books, because they are charges ordained by testaments, or other dispositions. And as for the other charges which are common both to successions by testaments and to those of intestates, they have been explained in the three foregoing sections, except that of funeral charges, which shall be the subject-matter of this.

2652. Although the texts of the Roman law quoted on the articles of this section have relation to the heathenish ceremonies that were used in funerals at Rome, before the Christian religion was known there; yet they agree nevertheless with the rules explained in these articles, which are to be understood of the funeral expenses that are applied to the uses approved of by the church.

Art. I.

2653. *What are the Funeral Charges.* — By funeral charges are meant all the expenses necessary to be laid out after the death of any person, whether it be on the body of the deceased, as to embalm it, and to transport it, if there is occasion for it, and to inter it, or for the services and honors which are usual at funerals.[a]

II.

2654. *The Funeral Charges are privileged.* — The charge of the funeral expenses affects all the goods of the deceased, as much as if the person who furnishes the things necessary had contracted for them with the deceased himself.[b] And he has, moreover, a privilege on the said goods,[c] as has been mentioned in the fourteenth article of the fifth section of *Pawns and Mortgages.*

[a] *L.* 37, *D. de religios. et sumpt. fun.*; — *v. l.* 14, § 3, *et seq., eod.*
[b] *L.* 1, *D. de religios. et sumpt. fun.*
[c] *L.* 45, *eod.*

III.

2655. *They ought to be regulated according to the Estate and Quality of the Deceased, and other Circumstances.* — If the said charges are regulated and advanced by any other person than the heir, whether it be in his absence or without his knowledge, they ought to be moderated according to the circumstances of the quality and estate of the deceased, the usage of the place, and other circumstances which may justify the prudence and integrity of the person who advances them. And the heir will not be bound to reimburse that which has been laid out over and above what the said circumstances might demand.[d]

IV.

2656. *Without Regard to the unreasonable Dispositions of Testators.* — If the deceased himself had regulated what should be laid out on his funeral, the heir would be obliged in that case to execute the said will of the deceased, provided that it contained nothing contrary to law or good manners, and that the expense did not exceed the bounds which the condition and estate of the deceased would require, according to the usual custom and the circumstances. For heirs are not bound to execute the unreasonable dispositions of those to whom they succeed.[e]

V.

2657. *If any other besides the Heir had laid out those Expenses, how he may recover them.* — If any other person than the heir lays out the funeral expenses, with a design to do an act of civility or charity towards the deceased, having no intention to apply for a reimbursement thereof, the heir will in that case be discharged from it, provided that this intention be sufficiently proved, for it would not be just to presume it. But to obviate all uncertainties, the persons who advance the funeral expenses ought to make known their intention, whether it be to recover the expenses they lay out, or to give them, if the circumstances might render their intention any way doubtful.[f]

[d] *L.* 14, § 6, *D. de relig. et sumpt. fun.*; — *l.* 12, § 5, *eod.*

[e] *L.* 14, § 6, *in f. D. de relig. et sumpt. fun.*

[f] *L.* 14, § 7, *D. de religios. et sumpt. fun.* See the fourth article of the second section of the third title.

SECTION XII.

OF THE ENGAGEMENTS OF COHEIRS TO ONE ANOTHER.

2658. When there are two or more heirs who succeed jointly to an inheritance, whether it be by testament or as next of kin, there are formed between them divers sorts of engagements, by the bare effect of the quality of coheirs. For being to possess jointly, or to divide among them the goods of the succession, they are mutually engaged to the consequences of the possession which they have in common, and to those of the partition which they make of the said goods among them.

2659. These engagements of coheirs to one another are of two sorts. One is of those which precede the partition; the other is of those which are formed by the partition itself, or which are consequences of it. The engagement, for example, to divide the inheritance, and that of taking care of the common thing, precede the partition; and the warranty against evictions which one of the coheirs may suffer of the lands and tenements which fall to his share, and the payment of the charges which fall upon him, are of the number of those engagements which follow after the partition. We shall explain in the fourth title the engagements which relate to the partition, for it is a matter of such extent, that it requires a separate title in its proper place; and the others shall be the subject-matter of this section.

Art. I.

2660. *The Coheirs ought to inform one another reciprocally of what they have or know of the Inheritance.* — The first engagement of coheirs to one another, before the partition of the inheritance, is to inform one another reciprocally of what each of them either has or knows of the goods and of the charges of the inheritance. And such of them as happen to have in their possession any of the goods of the inheritance, or have the charge of them, ought to take the care of them that is required by the following rule.[a]

II.

2661. *The Care which Coheirs ought to take of the Goods belonging to them in common.* — Whoever of the coheirs is charged with

[a] See the following article.

any of the goods of the succession, or a part of them, or with some affair or other thing in particular, ought to take the same care thereof as he does of his own proper affairs, and he will be responsible to his coheirs for the consequences which may be laid to his charge for not having taken that care. But if, for want of understanding or experience, the said heir was not very capable of looking after his own affairs, and that, by reason of this defect, he had failed to do that for the goods of the inheritance which were committed to his charge which any other more skilful and more diligent person would not have omitted to do, he shall not be accountable for it;[b] as one would be who should intrude himself into the management of another man's affairs in his absence, or without his knowledge;[c] or as a tutor,[d] a curator,[e] or an attorney or agent;[f] or others whose duties oblige them to the same diligence and watchfulness in other men's affairs that a careful and diligent master takes of his own. For whereas these sorts of persons either intrude themselves, or are chosen and appointed for these kinds of functions, under the necessity of acquitting themselves well of their several functions, because they do not concern their own proper affairs, but those of others, and that therefore they ought to discharge them with all imaginable application; coheirs do not make choice of one another, but happen to be bound one to the other, either by the will of a testator, or by the law, which calls them all jointly to the inheritance. So that each of them ought to take his precautions as to the trust he puts in the others, and to blame himself for the consequences that may attend the conduct of his coheir in whom he has confided. And, moreover, the affairs of the inheritance belonging to them in common, each of them is bound only to take the same care of them as he does of his own affairs, in the same manner as a copartner.[g]

III.

2662. *They ought to divide the Profits which they have made.*— The heir who before the partition has had the enjoyment of any lands or tenements, of a rent, or other thing belonging to the in-

[b] *L.* 25, § 16, *D. fam. ercisc.*

[c] See the second article of the first section *Of those who manage the Affairs of others without their knowledge.*

[d] See the ninth article of the third section of *Tutors.*

[e] See the first article of the second section of *Curators.*

[f] See the fourth article of the third section of *Proxies.*

[g] See the second and third articles of the fourth section of *Partnership.*

heritance, ought to divide with his coheirs the fruits and other revenues which he has received. And even the heir who shall happen to have had the enjoyment of the whole inheritance, whilst his coheirs were ignorant of their right, or were absent, ought to be accountable to them for the profits which he has made out of the common estate.[h]

IV.

2663. *And even what has been added to it by Industry, the Expenses being deducted.* — If he who has enjoyed the fruits and other revenues of the inheritance had, by his industry, made more thereof than his coheirs would have been able to do, he shall be bound nevertheless to restore the value of the profits which he has made. For there are no fruits, or at least but very few, which are reaped without some industry, and it is still the land that has produced them.[i] But out of the profits which he has made, he is allowed to deduct the expenses he has been at, which would be allowed even to an unjust possessor.[l]

V.

2664. *They ought to reimburse one another the Interest of Money which has been advanced.* — If an heir or executor has laid out money, either necessarily or to advantage, on the affairs of the inheritance, he shall recover it, together with the interest due from the time that he advanced it.[m]

[h] *L.* 9, *C. fam. ercisc.*; — *l.* 56, *eod.*; — *l.* 2, *C. de petit. hæred.*; — *l.* 20, § 3, *in f. D. de hæred. pet.*; — *l.* 17, *C. fam. erc.* See the ninth and tenth articles of the third section of *Interest, Costs, and Damages*, and *Restitution of Fruits.*

[i] *L.* 56, *D. de hæred. petit.*

[l] *L.* 36, § *ult. D. eod.*

[m] *L.* 18, § 3, *D. fam. ercisc.*; — *l.* 67, § 2, *D. pro socio*; — *l.* 52, § 10, *eod.* The condition of coheirs ought to be in this respect the same with that of partners. See the eleventh article of the fourth section of *Partnership*, and the fourth article of the second section *Of those who have*, &c.

We have put down in the article, that the heir or executor recovers the interest of what he lays out necessarily or to advantage; although it is said in the first of the texts cited on this article, that, if the heir has disbursed any thing honestly and fairly, he shall have the interest of it. For it may happen that an imprudent heir may lay out honestly foolish expenses. Thus the honesty and integrity of the heir ought to be reduced to expenses which it is just to allow; that is to say, such as are necessary or profitable.

We have likewise said in the article, that the said interest is due from the time that the money was advanced, although it be said in the same text, that it is due from the time of the delay, *ex die moræ*. For this interest is due to this heir in the same manner as to a partner, as has been said in the eleventh article of the fourth section of *Partnership*, and the reciprocal honesty and integrity which coheirs owe to one another demands this mutual justice among them.

VI.

2665. *They ought to bring into the Mass of the Inheritance the Things which ought to be brought in.* — In the cases where the coheirs may have any goods which ought to be brought into the mass of the inheritance, they are obliged every one of them to bring in reciprocally all the goods which they have of this kind, in order to augment thereby the mass of the inheritance, and that they may be comprised in the partition, according to the rules of this matter explained in their proper place.[n]

VII.

2666. *One Heir cannot make any Changes without the Consent of the Others.* — Whilst the goods of the inheritance remain undivided, none of the coheirs can make any change in them, against the will or without the knowledge of the others; and much less can he alienate them. And any one of them that does not approve of the change or alienation may hinder it;[o] unless the same should be necessary for the common good. As if any necessary repairs were to be made, or things to be sold which could not well be preserved from perishing. For in these cases the judge would have no regard to the unreasonable opposition of a coheir.[p]

VIII.

2667. *Engagement to come to a Partition.* — We may reckon among the engagements which precede the partition, that very engagement which obliges the heirs to come to a partition, when any one of them demands it; for each of them has a right to have separately to himself that which may fall to his share of the goods of the inheritance, although the others should be willing to keep them in common.[q]

[n] See, touching this matter of bringing goods into the mass of the inheritance, the fourth title of the second book. See the thirteenth article of the fifth section, and the fourth article of the first section of *Partitions*.

[o] *L.* 28, *D. comm. divid.*

[p] *L.* 13, *D. fam. erciscund.*; — *l.* 5, *D. de hæred. pet.*; — *d. l. in f. pr.* See the sixth, seventh, eighth, ninth, and tenth articles of the second section *Of those who chance to have any Thing in common together*, where other rules on the same subject are explained.

[q] *L.* 34, *D. fam. erisc.* See the eleventh article of the second section *Of those who chance to have any Thing in common together.*

SECTION XIII.

OF THOSE WHO ARE IN THE PLACE OF HEIRS OR EXECUTORS, ALTHOUGH THEY ARE NOT REALLY SO.

2668. THERE are, properly speaking, only two kinds of heirs, those to whom the law gives the succession, and those who are called to it by a testament; and the name of heir is given only to those who succeed by one or other of these two ways. But there are other titles which transmit all the goods of a person after his death to other kinds of successors, or rather possessors, who, although they are not heirs, have nevertheless the same rights, and are subject to the same charges. This shall be the subject-matter of this section.

ART. I.

2669. *The Exchequer is in the Place of Heir to the Goods of a Condemned Person.* — All the goods of persons condemned to death, or to other punishments which imply forfeiture of goods, accrue to the king, and he is in the place of universal successor; but the quality of heir does not suit with him. For whereas the estate does not pass to the heir but by the death of the person to whom he succeeds, forfeiture is a title which deprives the condemned person of his estate before his death, and appropriates it to the king, as exercising the sovereign authority of justice, and the rights which appertain to it. And the lords of manors, who have the right of forfeiture within their own lands, have it only as an accessory to the right of justice; and they are not looked upon as heirs, but become masters of the forfeited goods.[a]

[a] Damnatione bona publicantur, cum vita adimitur, aut civitas. *L.* 1, *D. de bon. dam.* See the preface to this second part, no. 14.

Forfeiture had not the same effect by the Roman law that it has by our usage in France. For, according to our usage, the children of those persons whose goods are forfeited do not succeed to them, nor have they any share in their goods. But by the Roman law they were allowed a share of them. Which was founded on motives of equity and of humanity, that the children might not be punished for the crime of their fathers, in which they had no hand, and that they might not be deprived of a succession which nature destined for them, nor be reduced to a necessity which might have fatal consequences. Which is particularly pointed at by these words of a law: — Cum ratio naturalis, quasi lex quædam tacita liberis parentium hæreditatem addiceret, velut ad debitam successionem eos vocando, propter quod et in jure civili suorum nomen eis indictum est: ac ne judicio quidem parentis, nisi meritis de causis summoveri ab ea successione possunt:

II.

2670. *And to the Estates of Aliens, or Foreigners.* — The goods of foreigners who die without being naturalized, and who leave behind them no lawful heirs born in France, or naturalized, who are capable of succeeding to them, belong to the king, by virtue of the right which he has of succeeding to the estates of aliens.[b] And he takes the said goods, not as heir, but as master or owner of goods to which no person can have any right.

III.

2671. *And of Bastards.* — Bastards who die without children lawfully begotten, and without making a will, having no heirs, their estates for this reason belong to the king, and he succeeds to them, not as heir, but as possessing as master an estate which cannot pass to any successor.[c]

IV.

2672. *And of those who have no Relations.* — Those who die without descendants or ascendants, and without any relations, either by father or mother, and who have not disposed of their estates by will; they dying without heirs, their estates belong to the king, by virtue of the right which he has to succeed to all persons who die without heirs or executors.[d]

æquissimum existimatum est eo quoque casu quo propter pœnam parentis aufert bona damnatio, rationem haberi liberorum, ne alieno admisso, graviorem pœnam luerent, quos nulla contingeret culpa: interdum in summam egestatem devoluti. Quod cum aliqua moderatione definiri placuit, ut qui ad universitatem venturi erant, jure successionis ex ea portiones concessas haberent. *L.* 7, *D. de bon dam.* It is not necessary to draw a parallel here between the Roman law and the law of France in this matter, that being no part of the design of this book. We shall only observe, that there are some customs in France where confiscations do not take place.

[b] See the ninth article of the second section of this title, and the eleventh article of the second section of *Persons*. See the third article of the fourth section of this title, and the remark that is there made on it.

[c] See the eighth article of the second section of this title, and the third article of the first section of *Persons*. What is said in this article of the king's succeeding to bastards is to be understood likewise of the lords of manors within the bounds of their respective lands.

[d] *L.* 1, *C. de bon. vac. et de inc.*; — *l.* 4, *eod.* What is said in this article concerning the king's right to the succession of those who die without heirs or executors is likewise to be understood of lords of manors within the bounds of their lands.

It is necessary to remark on this article what has been said concerning the succession of the husband to the wife, and of the wife to the husband, in default of relations, in the preface to this second part, no. 11, and what shall be said on the same subject in the third section of the third title of the second book, that when there is no testament, and

V.

2673. *All these Sorts of Goods go to the King, with their Burdens.* — These four ways by which estates are acquired to the king, to wit, forfeiture, succession to aliens, to bastards, and to those who die without heirs, have all of them this in common, that, as they transmit all the goods to the king, so he is in the place of universal successor, and the said goods remain subject to all the debts, and to the other charges.[e]

VI.

2674. *The Universal Donee is in Place of Heir.* — We may reckon among the number of those who are in the place of heirs, although they have not that quality, universal donees, that is, those to whom any person makes over by deed of gift in his lifetime all the goods which he possesses at present, or shall afterwards acquire. For these donees having all the goods, they are bound for all the charges, by the effect of their title. But the name of heir is not applicable to them, because the goods which the donor possessed at the time of the donation did from that moment belong to them irrevocably, and the donor could not alienate them. And although he might dispose of his other goods, which he acquired afterwards, by alienations which he was at liberty to make in his lifetime, yet he could not leave them by will to other persons. Thus, it is as donees that they succeed to the goods, and not as heirs.[f]

where the deceased has left no relations, the husband succeeds to the wife, and the wife to the husband, and exclude the exchequer.

It is to be observed, likewise, on the subject of successions for want of relations, that there are some customs in France, where, upon failure of relations by one stock, the lord of the manor is preferred to the relations of the other stock; so that in those customs those who have only effects which they have inherited of one stock, and leaving behind them only relations of the other stock, die without heirs.

[e] *L.* 4, *C. de bon. proscr. seu damn.* When estates devolve to the crown by any of the ways explained in this article, they belong either to those who have a mortgage on the king's demesnes, or to those who farm them, or in case there be neither mortgages nor farmers who can claim any right to the said estates, the king usually makes grants of them, which, according to the ordinances, are always made upon this condition, that the grantees shall acquit all the charges. See the ordinance of *Charles* VII. of the 30th of January, 1455. *Vid. lib.* 1 *et* 2, *C. de petit. bon. subl.*

[f] See the eighth article of the first section of *Donations*, and the thirty-fifth law, § 4, *Cod. de don.*, which is there cited, and which approves of universal donations of all the goods. Sed et si quis universitatis faciat donationem, sive bessis, sive dimidiæ partis suæ substantiæ, sive tertiæ, sive quartæ, sive quantæcunque, vel etiam totius, &c. This law has raised a doubt whether by the Roman law one can make a donation of the goods which he shall afterwards acquire, because there can be no delivery of them, as there may be of

VII.

2675. *The Purchaser of the Inheritance is in Place of Heir.* — We may likewise consider him as heir to whom an inheritance has been sold, although he is not in effect heir, not having suc-

goods which one has in his present possession; and this might be given likewise as another reason for it, that by the Roman law one cannot divest himself of the liberty of making a will, by an irrevocable institution of an heir, not even in favor of marriage.

Pactum quod dotali instrumento comprehensum est, ut si pater vita fungeretur, ex æqua portione ea quæ nubebat cum fratre, hæres sui patris esset, neque ullam obligationem contrahere, neque libertatem testamenti faciendi mulieris patri potuit auferre. *L.* 15, *C. de pactis.* But according to the usage in France, one may name a universal heir by an institution in a contract which cannot be revoked, as has been already mentioned in the preface, no. 10. And one may likewise give all his goods which he enjoys at present, or shall acquire for the future, by a donation that is to have its effect in his lifetime, and is irrevocable, provided the donor reserves to himself a usufruct, or something whereupon to subsist. For it would be contrary to equity and humanity, that he should be stripped of all. Thus the universal donee may, after the death of the donor, take possession of all the goods, in the same manner as the heir. But because he who has made a donation of all his goods, present and to come, may alienate the goods which he has acquired since the donation, and contract new debts, it is but just that, after the death of the donor, the donee should be at liberty to content himself with the goods which the donor had at the time of the donation, and to bear the charges thereof which were due at that time, and to renounce the goods acquired by the donor after the donation, and by that means to free himself from the debts and charges contracted afterwards. For which reason it is, that in this case a universal donation of all one's goods, present and to come, is distinguished into two donations: one, of all the goods which the donor possesses at the time of the donation; and the other, of those goods which the donor may acquire afterwards. Which distinction is commonly founded on this, that, in stipulations which contain several sums or several things, there are as many stipulations as there are sums or things (*L.* 29, *D. de verb. oblig.*); for it is certain, that he who has stipulated from a debtor things of several kinds may demand only such of them as he pleases. But this maxim does not prove that all sorts of covenants may be divided; and if this division should be prejudicial to the interest of one of the parties, it would be necessary, according to another rule, either to execute the whole covenant or to break it entirely; because, when there is an obligation on both sides, the mutual engagements ought to subsist. See the seventh article of the second section of *Covenants*, and the tenth and eleventh articles of the first section of *Rescissions*. *L.* 39, *in f. D. de oper. lib.*; — *l.* 16, *in fin. D. de admin. et per. tutor.* Thus, we may add as more particular reasons why the donation of goods which the donor is in present possession of ought to subsist, first, because the said donation is pure and simple by the contract, and the donation of goods to be acquired implies a condition that the donor shall afterwards acquire goods, which he cannot be said to do, if he acquires no more than what is necessary to pay the debts; for, properly speaking, that is only to be called goods which remains after the debts are paid. And in the second place, it would not be just that the donor should have it in his power to annul the donation by contracting debts. Which has been a motive for ratifying the donation of the goods which were in the possession of the donor when he gave them away; in which there is no injury done to the creditors who have contracted only after the donation, which they ought to have known of. But if the donee has taken possession of the goods after the death of the donor, without making an inventory of them, he cannot afterwards divide the donation: and his case is the same as if he were heir purely and simply. See, as to the division of an act, the remark on the nineteenth article of the fifth section of *Testaments*.

ceeded to the deceased, and having the goods only by the title of sale. But as he has the rights belonging to the heir, and, being in possession of all the goods, is bound for all the charges, he is therefore in the place of heir.[g]

VIII.

2676. *The Curator to a Vacant Succession represents the Heir.* — When a succession is abandoned, and the creditors get a curator to be named, or when a curator is named to successions to which there is no apparent heir, in order to take care of the effects, the said curators prosecute the hereditary actions, and acquit the charges; and those who have any claim or demand on the estate bring their actions against them. Thus, they represent in this sense the persons either of the heirs, if there be any, or of those to whom the goods may belong.[h]

TITLE II.

OF HEIRS OR EXECUTORS WITH THE BENEFIT OF AN INVENTORY.

2677. We have seen, in the fourth article of the fifth section of the first title, that the heir or executor who doubts whether the succession be advantageous may take a time to deliberate whether he shall accept or refuse it; and in the fifth article of the same section, that, in case of any such doubt, the heir or executor may, without deliberating, accept the succession with the benefit of an inventory. Which has this effect, that if the charges appear afterwards to exceed the value of the goods, he will be accountable only for so much as the goods amount to; whereas, if he did not make use of the said benefit, he would be simply and purely heir

[g] *L.* 2, § 9, *D. de hæred. vel act. vend.* See the eighth article of the first section of the third title.

[h] *L.* 2, § 1, *D. de cur. bon. dando.* See the fifteenth article of the first section of *Curators.* Vacant successions, to which there is no apparent heir, are put under the administration of a curator until an heir shall appear, or until the goods are acquired either to the king or to the lord of the manor. And curators are likewise named to estates that are abandoned to the creditors, till the goods be sold for payment of the debts.

or executor, and liable to all the charges of the inheritance, although the effects should not be sufficient to acquit them.

2678. Of these two ways which the law has established for the security of heirs or executors, the first that was in use at Rome was the right of deliberating. This right was invented, as it is said in a law, both for the interest of the dying persons, that they might have heirs to succeed them, being thereto allured by the liberty which they had to inform themselves of the state of the goods and affairs of the succession before they should engage in it; and likewise for the advantage of the heirs themselves, that they might not be obliged to engage themselves too hastily in that quality.[a]

2679. The method of using this right of deliberating was after this manner; the heir who was called to a succession, either by a testament, or as having right to succeed to one dying intestate, applied to the magistrate for a time to deliberate, and a delay was granted him at least of a hundred days.[b] During that time, the papers belonging to the deceased were communicated to the heir, and he examined all the debts owing by the deceased, by the titles or deeds of the creditors, in order to take his measures for accepting or refusing the succession.[c] And even those who named their heirs might, by the ancient law, regulate by their testaments a certain time which they gave them to deliberate, after the expiration of which, the heir who did not accept the succession within that time was excluded from it;[d] but this was afterwards abolished.[e]

2680. This faculty of deliberating was of no other use but to give the heir time to examine whether it would be for his advantage to accept the succession, or whether it would be better for him to renounce it: and seeing he was obliged after that time to resolve either to accept the inheritance purely and simply, and to engage himself for all the charges, or to renounce it, without being at liberty to choose any middle way, there followed from thence several inconveniences, both to the heirs and also to the legatees and creditors. For the heirs might easily be deceived by the appearance of the goods, the charges whereof might be difficult, or even

[a] *Ll.* 5 *et* 6, *D. de interrog. in jur. fac.*
[b] *L.* 1, § 1, *D. de jur. delib.*; — *l.* 2, *eod.*
[c] *L.* 28, *D. de acq. vel omitt. hæred.*; — *l.* 5, *D. de jur. delib.*
[d] *V. Ulp. tit.* 22, § 27, *et seq.*
[e] *L.* 17, *C. de jur. delib.*

impossible, to be known, they being often secret and hidden; and they being once engaged in burdensome successions, they could not be afterwards at liberty to renounce them. And they might likewise be deceived in another manner, by renouncing successions which might happen to be of greater value, and attended with fewer charges, than did appear, which was to the prejudice of the creditors and legatees. These inconveniences lasted for several ages, and, until the time of Justinian, without any other remedy besides that of an exception which the Emperor Gordian had made in favor of soldiers who happened to be engaged in burdensome successions, to whom the said emperor granted this privilege, that their own goods should not be subject to the charges of the succession,[f] which was difficult to be put in practice without an inventory, by which it might appear wherein the goods of the succession did consist. And at last Justinian established in favor of all heirs, whether they succeeded by testament or to intestates, of whatsoever quality or condition, without any distinction, a liberty to accept with the benefit of an inventory the succession that falls to them, that is to say, on condition that they shall not be liable to the charges farther than the value of the goods, of which an inventory ought to be made by a public officer. Which has this effect, that the creditors, legatees, and other persons concerned, may have knowledge of all the goods of the inheritance which are appropriated to them, and that the heir does not engage his own estate, but obliges himself only to account for what is contained in the said inventory; and by this means full and entire justice is done, both to the heirs, to the legatees, and to the creditors.[g]

2681. As the first use of the benefit of an inventory is to give to the heir or executor the liberty of deliberating whether he shall accept the succession or not, and of doing it with the greater safety, because of the knowledge of the goods and charges of the inheritance which he may have from the inventory, so this benefit of an inventory has not abolished the use of deliberating; and Justinian has reserved it in the same law by which he has established this other benefit. Which has this effect, that those who doubt whether it be not more advantageous for them not to accept the inheritance at all, even with the benefit of an inventory, rather than to engage themselves therein, may determine themselves and

[f] *L. ult. in princip. C. de jur. delib.*

[g] See the second section of this title.

take their final resolution after having deliberated thereon; and that they may likewise without deliberating accept the succession with this benefit, which secures their own estates, since they do not engage themselves for more than the value of the goods. Thus, we may distinguish in this matter the right to deliberate, and that of using the benefit of an inventory, which shall be explained in the first two sections of this title; and in the third we shall explain the effects of the said benefit.

SECTION I.

OF THE RIGHT TO DELIBERATE.

ART. I.

2682. *The Heir may deliberate.* — The heir or executor, who, being ignorant of the charges of the inheritance, is afraid to engage himself therein, may take the time allowed by law for deliberating, before he declares whether he will accept the succession or not.[a]

II.

2683. *He informs himself by the Inventory.* — To put the heir or executor in a condition to deliberate, it is necessary that he should have the means of informing himself of the goods and charges of the succession; and that he and all other persons concerned may have this information, the judge directs an inventory to be made of all the deeds and writings belonging to the inheritance, which are communicated to them.[b]

III.

2684. *Curators named to the Succession while the Heir is deliberating.* — If, during the time that the heir is deliberating, there should fall out some affair in which it should be necessary to com-

[a] *L.* 3, *D. de jure delib.*; — *l. ult.* § 13, *in f. C. eod.* By the ordinance of 1667, in the title of *Delays for deliberating*, the heir has three months from the time that the succession is open to make the inventory, and forty days thereafter to deliberate.

[b] See the texts quoted under the letter *e*, in the preamble to this title. As it is only by the means of the inventory that the heir can come at this knowledge, the ordinance cited on the foregoing article has made provision accordingly, as has been already observed, by making the time allowed for deliberating to commence only after the inventory is made.

mence a suit, for the preservation of some right belonging to the inheritance, or to defend it against some claim or pretension, and the matter could not admit of delay, it would be necessary to name a curator to the inheritance, in order to prosecute its rights, and to defend it until the heir, by accepting the succession, may be in a capacity to act himself.[c]

IV.

2685. *Sale of Things which are perishable.* — If, in the same case, when the heir delays to accept the succession, or to renounce it, there be goods belonging to the inheritance which by being kept are in hazard of perishing, or of being damaged, or of diminishing in their value, such as fruit, grain, liquors, or things which it would be more advantageous to sell than to keep, such as horses or other beasts that are not necessary, and which would occasion an expense; the heir or curator of the succession may sell and dispose of those kinds of things, in order to preserve the money that is got for them in the inheritance, observing in the said sales the forms prescribed in such cases.[d]

V.

2686. *Acquitting the Charges that are pressing.* — If there were any debts due from the succession, which it might be necessary to pay off speedily, the moneys arising from the sales that are to be made, according to the rule explained in the foregoing article, should be employed for that purpose, or things which are the least necessary might be sold, or debts that are owing to the estate might be called in, in order to clear off the said demands, or to satisfy the other expenses that are equally necessary, such as the funeral charges, the tillage of the lands, necessary repairs, and others of the like nature, according as the judge should direct.[e]

[c] *L.* 3, *D. de curat. fur.* See the fifteenth article of the first section of *Curators.* Seeing the time allowed to the heir for deliberating is much shorter by the ordinance cited on the first article than it was by the Roman law, and that the delay for deliberating runs only from the time that the inventory has been made, we must understand what is said in this and the following articles, not only of what happens during the delay for deliberating after the inventory is made, but likewise of the time that the inventory is making, and before it be set about.

[d] *L.* 5, § 1, *D. de jure delib.* These sales are made by cant or auction, and by permission of the judge; unless it be that the inconsiderableness of the things that are sold, and the consent of the parties interested, may excuse the charges of these formalities. See the following article.

[e] *L.* 6, *D. de jur. delib.*; — *l.* 7, *in f. eod.*; — *d. l.* 7, *in princip.*; — *l.* 5, § 1, *in f. eod.*

VI.

2687. *Alimony to the Children during the Time that they deliberate.* — If the heirs are infants, who deliberate concerning the inheritance of their father, mother, or other ascendant, and they have no other means of subsistence during the time that they have for deliberating, they may in the mean while obtain from the judge a moderate provision out of the goods of the succession for their maintenance.[f] For there is less inconvenience in taking a provision of this nature out of the estate, although the children should renounce the succession, than there would be in depriving them of it during the delay which the law allows them. And if it should happen to be in the case of a succession of a father, on which the children should have some demand in right of their mother, who is already deceased, this provision, being deducted out of their demands, would still admit of less difficulty.

VII.

2688. *Many Heirs successively have each of them a Right to deliberate.* — If several persons were called to the same succession, one in default of the other, as if a testator, having instituted an heir, and foreseen the case, either that the said heir should die before him, or that he would not accept the succession, had substituted another in his place; or that the testamentary heir, or the heir to an intestate, renouncing the succession, the next in degree of kindred should be willing to accept it; in all these cases the heir who is called to the succession in default of another would have the same right to deliberate, as he had in whose place he succeeds.[g] For the time granted for deliberating cannot begin

[f] *L.* 9, *D. de jur. delib.*; — *l. ult. C. de ord. cogn.*; — *v. l.* 51, *D. de hæred. pet.* Although the words of the second text cited on this article, and the fifty-first law, *D. de hæred. pet.*, relate to other matters, yet we may apply here that which concerns the moderating of these sorts of provisions, the equity whereof is founded on the necessity of maintaining the children, but which ought to be as little burdensome to the creditors as is possible.

We must observe upon this article, that the provisions mentioned therein have fewer inconveniences according to the present usage in France, than they had in the Roman law, by which the time for deliberating was much longer. See the remark upon the first article.

[g] *L.* 10, *D. de jur. delib.* See the title of *Vulgar Substitutions*. We must not confound the condition of him who succeeds to an heir, purely and simply as his heir, with the condition of heirs who are substituted one to the other, or who take the place of a first heir, to succeed in his default. For whereas these have the right to deliberate whether they shall accept the same inheritance in the same manner as the heir had, in whose place they succeed; he who becomes pure and simple heir to another, who had accepted the inheritance,

to run, with respect to each heir, but only after he is called to the succession.

VIII.

2689. *The Heir who dies while he is deliberating transmits his Right to his Successors.* — If the heir who was deliberating happens to die before he has declared his mind, he transmits his right to his heir or executor, who may deliberate likewise whether he shall accept or refuse the succession that was fallen to the deceased.[h]

SECTION II.

HOW ONE BECOMES HEIR OR EXECUTOR WITH THE BENEFIT OF AN INVENTORY.

ART. I.

2690. *One may become Heir with the Benefit of an Inventory, without deliberating.* — Every heir or executor, who doubts whether the succession be advantageous or not, and who is afraid to engage himself in it, may beforehand demand that an inventory be made of the effects, and of the deeds and writings belonging to the inheritance; and without taking time to deliberate, he may declare that he accepts the succession with the benefit of an inventory. And by this means he will be liable for the debts and charges of the inheritance only in so far as the goods belonging to the deceased shall be sufficient to acquit, and his own estate will not be chargeable therewith.[a]

II.

2691. *The Inventory ought to be made according to Form.* — The creditors, the legatees, and all other persons who have any claim on the inheritance, having an interest in this inventory, the heir or executor cannot make it by himself, but it ought to be made by a

has not right to deliberate whether he shall accept that inheritance or not; but it goes to him with the same engagements which the person was under who had accepted it, and to whom he succeeds.

[h] *L.* 19, *C. de jur. delib.* See, concerning this right of transmission, the tenth section of *Testaments.*

[a] *L. ult.* § 2, *C. de jur. deliber.*; — *d. l.* § 4.

public officer, and according to the form which the law and usage have established in this matter.[b]

III.

2692. *It ought to take in all the Goods.* — This inventory ought to contain all the goods of the succession that were sealed up by order of the judge, or are discovered by persons who have any knowledge thereof. And the heir or executor ought likewise to declare what he knows of them, and to swear that he does not detain or conceal any effects belonging to the inheritance.[c]

IV.

2693. *The Omissions may be supplied.* — If the creditors or legatees, and other persons concerned, should discover that things have been omitted in the inventory, or should anyways mistrust it, they will be admitted to prove the omissions and frauds which they shall allege.[d]

V.

2694. *Punishment of Diverting the Effects.* — If the heir or executor had secretly conveyed away any of the effects belonging to the succession, or failed to discover what he knew thereof, this unfair dealing would be punished in such a manner as the quality of the act might deserve, according to the circumstances.[e]

SECTION III.

OF THE EFFECT OF THE BENEFIT OF AN INVENTORY.

ART. I.

2695. *The Heir with the Benefit of an Inventory is bound only for the Value of the Goods.* — He who, having got an inventory

[b] *L. ult.* § 2, *C. de jur. delib.* According to the usage received in France, the inventory ought to be made by authority of justice, after having sealed up the places where the writings and other effects belonging to the inheritance are kept.

[c] *L. ult.* § 2, *C. de jur. delib.* By the usage in France, not only is the heir obliged to give in a declaration upon oath, but likewise the servants of the deceased are obliged to declare upon oath what they know touching the effects of the deceased.

[d] *L. ult.* § 10, *C. de jur. delib.*

[e] Illo videlicet observando ut si ex hæreditate aliquid hæredes surripuerint, vel celaverint, vel amovendum curaverint, postquam fuerint convicti, in duplum hoc restituere, vel

made according to form, declares himself heir with the benefit of an inventory, will not be liable for the charges of the succession but in so far as the value of the goods belonging to the deceased amounts to, and his own estate will not be anyways chargeable therewith,[a] as has been said in the first article of the second section.

II.

2696. *The Legacies are reduced according to the Goods.* — If the heir or executor, who has the benefit of an inventory, be burdened with legacies exceeding the sum which one is allowed to dispose of by will,[b] he may get them to be reduced in proportion to the goods which remain clear, after the debts and other charges are deducted.[c]

III.

2697. *The Heir who is a Creditor preserves his Debt.* — If this heir, who has the benefit of an inventory, was himself a creditor to the deceased, his quality of creditor shall not be confounded with the quality of heir, which makes him debtor to himself; but he shall preserve his right whole and entire, in the same manner as the other creditors, and that with the mortgages and privileges which he had for the security of his debt.[d]

IV.

2698. *And recovers his Expenses.* — All the expenses which the heir who has the benefit of an inventory has been at, whether it be for the funeral of the deceased, for making the inventory, or for repairs, and all other necessary charges, shall be allowed him out of the goods of the inheritance which he shall have received.[e]

V.

2699. *He ought to sell the Movables.* — The heir who has the benefit of an inventory not being bound to discharge the debts

hæreditatis quantitati computare, compellantur. *L. ult.* § 10, *in f. C. de jur. delib.* This penalty of the double is not in use in France; but the heir who should be found guilty of such unfair practices would be proceeded against according to the circumstances. And if they shall appear to be such as to render the heir unworthy of the benefit of an inventory, he may be debarred of it.

[a] *L. ult.* § 4, *C. de jur. delib.*

[b] See the third title of the fourth book.

[c] *L. ult.* § 4, *C. de jur. delib.*; —*l.* 39, § 1, *D. de verb. signif.*

[d] *L. ult.* § 9, *in f. C. de jur. delib.*

[e] *L ult.* § 9, *C. de jur. delib.*

but with the goods of the inheritance, he ought to sell the movables, as the readiest means for paying off the debts.[f]

VI.

2700. *He is only bound to render an Account.* — When the heir shall pretend that the goods of the succession are exhausted in paying the debts, legacies, and other charges, he shall be under no further obligation to those who have any claim on the goods of the succession than to give an account of them, in which he is to charge himself with the goods according to the inventory, and to put down in his discharge all the debts and other charges which he has acquitted.[g]

VII.

2701. *He is not obliged, in paying the Creditors, to observe their Order.* — Although the goods of the succession be not sufficient to acquit all the charges, yet the heir or executor who has the benefit of an inventory may pay off the creditors who come first to demand their debts, if there be no attachment of the goods, or other hindrance on the part of the other creditors. For he is not bound to know who are the creditors, nor in what order they are ranked. And those who come after all the goods of the succession are disposed of to other creditors, ought to blame themselves for their delay.[h]

VIII.

2702. *He may pay off the Legatees if the Creditors do not appear.* — If the creditors do not appear, the heir or executor may pay off the legacies. But if there should not remain effects enough to satisfy the creditors, they may oblige the legatees to give back what they have received. For the legacies are due only after the debts are paid.[i] And in such a case, greater regard ought to be had to the interest of the creditors, which is not to

[f] See the text quoted on the fourth article of the first section. This sale ought to be made after the publications which are necessary for bringing in many buyers, and for preventing the frauds which are usual in private sales. And it is so ordered by some customs in France.

[g] *L. ult.* § 4, *C. de jur. delib.* It is only by an account that the heir who has the benefit of an inventory can show that he has employed the goods for paying the debts and clearing the other charges.

[h] *L. ult.* § 4, *C. de jur. delib.*

[i] *L. ult.* § 4, *in f. C. de jur. delib.*; — *d. l. ult.* § 5.

lose what is justly due to them, than to the interest of the legatees, which consists only in reaping a benefit which is to be taken only out of the goods of the succession that shall remain clear after payment of all the debts.[l]

IX.

2703. *The Lands which are given in Payment remain subject to the Mortgages.* — If any creditors had taken in payment lands or tenements which were part of the succession, and other prior creditors should happen to appear afterwards, they might exercise their right of mortgage, if they had any, on the said lands or tenements which had been given to the other creditors; and the heir who had the benefit of an inventory would not be bound either in warranty to those who had taken the said lands or tenements in payment, nor for what the other creditors may come short in the payment of their debts, farther than to the value of the goods of the succession which may remain in their hands.[m]

TITLE III.

IN WHAT MANNER A SUCCESSION IS ACQUIRED, AND HOW IT IS RENOUNCED.

2704. The reader sees plainly that these words of this title, *in what manner a succession is acquired*, do not regard the manner in which one is called to the quality of heir or executor; for it has already been sufficiently explained that one is made heir either by the disposition of the testator, or by the provision of the law; but they have respect only to the manner in which he to whom a succession is fallen, whether it be by testament, or as next of kin

[l] *L.* 41, § 1, *D. de reg. jur.* It is hardly possible, according to the usage in France, that it should happen that an heir should pay off legacies before the debts. For the benefit of an inventory is made public, both by its being entered in the acts of court, and by the public notice that is given before the sale of the movables, as has been observed on the fifth article. But it may so happen that some creditor may have been hindered from bringing in his claim, either by reason of his absence or for some other cause, which ought not to be of prejudice to the heir, who paid the legacies honestly and fairly, without any intent to defraud the creditors.

[m] *L. ult.* §§ 6 *et* 7, *C. de jur. delib.*

to an intestate, and who has as yet done no act whereby he accepts that quality, may declare himself heir, if he will make use of his right, and acquire the goods of the succession. And these other words which follow, *how it is renounced*, are to be understood of the ways by which he who is called to be heir or executor may signify his refusal of it. For he may either accept of that quality, or renounce it. And since he may explain himself by several ways, and since he may likewise do some acts which would make him heir or executor, although he should have no such intention, the different ways in which an heir or executor may carry himself with respect to the succession that is fallen to him, whether it be in accepting or renouncing it, shall be the subject-matter of this title. And in the first section we shall explain the acts which engage one in the quality of heir or executor, and which imply the entry to or acceptance of the succession. In the second, we shall show what are the acts which may have some relation to the quality of heir or executor without engaging one in it. The third shall be concerning the effects and consequences of the acceptance of the inheritance. And in the fourth we shall explain what belongs to the renunciation of the inheritance.

SECTION I.

OF THE ACTS WHICH ENGAGE ONE IN THE QUALITY OF HEIR OR EXECUTOR.

ART. I.

2705. *In what the Engagement to the Succession consists.* — The engagement in the quality of heir or executor ought to have the same effect as if the heir or executor had treated with the deceased to whom he succeeds, as has been said in its proper place; and it is the same thing in effect as if it had been agreed between them that, if the heir or executor would accept that quality, he should have all the goods of the succession, and should likewise be bound to acquit all the charges.[a] Thus, in order to judge by

[a] See the eighth article of the first section of the first title. This kind of treaty between the deceased and his heir or executor is made on the part of the deceased in his testament, when there is one, and on the executor's part in the moment that he accepts the succession. For the testator explains in his testament his intention to leave his goods to his executor on condition that he shall satisfy all the charges; and the executor, by ac-

the acts of the heir whether they engage him in this quality or not, we ought to consider in them the relation which they may have to this intention of the deceased, that the heir, by taking the goods, should subject himself to all the charges. And according as his conduct shall show that he is willing to fulfil the said intention of the deceased, it will prove his engagement, as shall be explained by the rules which follow.

II.

2706. *One may accept the Succession, either by express Acts, or otherwise.* — According to this first rule, we must distinguish two sorts of acts which may form the engagement of the heir to acquit the charges of the succession; those which signify expressly his intention to take the goods, and to engage himself for all the charges, as if he declares that he accepts the succession;[b] and those which have the same effect, although he do not explain himself; as if he takes possession of the goods of the inheritance, or if he does some other act which shows that his design is to have the goods.[c]

III.

2707. *What are the Acts of an Heir.* — All the acts which an heir may do in that quality, that is, acting as heir, oblige him as such, whether it be that he does that which he cannot do but as heir, or that the act which he does denotes his willingness to be heir. The meaning and use of this rule will better appear from the articles which follow.[d]

IV.

2708. *The Heir who in that Quality receives Payment of a Debt acts as Heir.* — The heir who receives that which he has no right

cepting the succession, does the same thing as if he subscribed to this condition in the will. And when there is no testament, the engagement is nevertheless the same. For the law which gives the succession imposes on the heir that is to succeed to it the same condition of acquitting the charges. So that in this case the heir, receiving the succession from the law, obliges himself in the same manner.

We may apply to this engagement of the heir or executor to the charges which are imposed upon him by the deceased, the usage of the ancient Roman law, by which testaments were made by an imaginary sale, which the deceased made to his heir. See the remark on the thirty-first article of the second section of *Heirs and Executors* in general.

[b] *L.* 4, *C. unde legitim. et unde cognat.*

[c] *L.* 6, *C. de jure delib.* See the following articles.

[d] See the following articles.

to receive but in that quality, does an act which properly belongs to the heir.[e] As if he receives payment from one that is debtor to the inheritance; for by receiving it he declares his intention to make use of his right of heir.

V.

2709. *And if he pays a Debt of the Succession.* — If the heir makes payment of a debt to one of the creditors of the succession, he thereby declares that he accepts the succession, and engages himself to acquit the charges,[f] since he acknowledges himself to owe what he pays, and which he does not owe but as heir.

VI.

2710. *If he takes any of the Goods, or reaps the Fruits.* — If he who is called to an inheritance takes any of the goods belonging to it after that it is open, as if he reaps the fruits of any ground, if he cultivates it, if he farms it out, if he takes any of the movables of the succession, if he sells them, or disposes otherwise of them, and, in general, if he takes that which he had no right to take but as heir, or if he disposes of any goods of the succession as master and owner, he makes himself thereby heir.[g]

S

VII.

2711. *Although he errs in the Fact.* — The heir who has taken possession of some particular thing which was not part of the succession, but which he by mistake thought did belong to it, does even in that an act of heir. For he declares his intention to accept of that quality, and by that means obliges himself to it.[h]

VIII.

2712. *He who disposes of the Inheritance makes himself Heir.* — The heir who, even before he intermeddles any way with the inheritance, sells it, or gives it to another, or disposes of it otherwise, makes himself heir, and remains bound for all the charges in the same manner as if he had accepted the succession. For to sell or dispose of it is to make use of it as master.[i]

[e] *L.* 20, § 4, *in f D. de acquir. vel omitt. hæred.*

[f] *L.* 2, *C. de jure delib.*; — *l.* 8, *C. de inoff. test.*

[g] § 7, *Inst. de hæred. qual. et diff.* See the text quoted on the fourth article.

[h] *L.* 88, *D. de acquir. vel omitt. hæred.*

[i] *L.* 2, *C. de legat.* See the eighteenth article of the first section of *Heirs and Executors*

IX.

2713. *As also he who receives a Sum of Money to renounce it.* — If he who was called to a succession receives a sum of money, or any other thing, to renounce it, and to let it go to the person who has right to succeed in his place, he does even by that renunciation an act of heir. For by receiving a price for the succession he sells it.[l]

X.

2714. *And also the Executor who renounces by Collusion with the Heir of Blood.* — If the testamentary heir, colluding with the heir of blood, had renounced the succession in order to leave the estate to him, and that even without any valuable consideration, both of them designing by this fraud to render the testament altogether ineffectual, he would nevertheless be bound to pay the legacies and other charges. For this collusion would be, in a manner, a disposal of the inheritance, and his knavery would deserve this just punishment.[m]

XI.

2715. *And likewise he who has embezzled any of the Effects.* — If a son, or other heir to the deceased, who should pretend to abstain from the inheritance, had embezzled any of the effects belonging to it, he would by that means have engaged himself to the charges; for his condition ought not to be any better for having subtracted the effects knavishly, than if he had taken as heir that which he has embezzled in this manner.[n]

XII.

2716. *If he embezzles after having renounced, he is guilty of Theft.* — It would not be the same thing in the heir or executor, who, after he has renounced the inheritance, should embezzle or purloin any of the effects belonging to it. For he would not by

in general. Although the text quoted on this article speaks only of him who has sold the inheritance, yet the disposing of it in any other manner has the same effect.

[l] *L.* 2, *D. si quis omiss. caus. testam.*; — *l.* 1, *C. si omiss. sit caus. test.* See the foregoing article, and the eighteenth article of the first section of *Heirs and Executors* in general.

[m] *L.* 1, § *ult. D. si quis omiss. caus. test. ab int. vel al. m. p. h.* The heir of blood is likewise bound for the legacies in this case. As to which the reader may consult the eighteenth and nineteenth articles of the third section of *Testaments*, and the remarks which are there made on them.

[n] *L.* 71, § 4, *D. de acquir. vel omitt. hæred.*

this act render himself heir, unless the circumstances were such as that it ought to have this effect; but he would thereby commit a theft, for which he would be punished.[o]

XIII.

2717. *The Next of Kin, being instituted by Testament, cannot stick to the Legal Succession in Prejudice of the Legatees.* — If the testamentary heir were the same person who had right to succeed to the testator if he had died intestate, and he, thinking to avoid the payment of the legacies and other charges imposed by the testament, should renounce the testamentary succession and cleave to his right of succeeding to the deceased as dying intestate, he would not by that be deprived of the succession,[p] but he would nevertheless be bound to execute the testament. For the testator might have named another person for his heir or executor, and he cannot have the goods of the deceased unless he executes his will.[q]

XIV.

2718. *A Minor is relieved against any Act he has done as Heir.* — The heir who is a minor cannot do any act of heir which may engage him irrevocably to that quality. And if the succession with which he has intermeddled proves to be burdensome, he is relieved from it.[r]

XV.

2719. *If the Minor who is relieved has for his Coheir one that is of Age, the said Coheir remains, nevertheless, Heir.* — If the minor who renounces the succession which he had already accepted had a coheir of full age who had likewise accepted the inheritance for

[o] *L.* 71, § *ult. D. de acquir. vel omitt. hæred.*

[p] *L.* 17, § 1, *D. de acquir. vel omitt. hæred.*

[q] *L.* 1, *D. si quis omiss. caus. test.*; — *d. l.* § 9, *in f.*; — *l.* 3, *C. si omiss. sit caus. test.* We must observe on this rule, that, in the provinces of France which are governed by their customs, if the testator charges his heir at law with more than he has power to give away by the custom, the said heir may stick to his right which belongs to him by the custom, and get the dispositions of the testament to be reduced in so far as they encroach on his right. For the testator could not dispose to his prejudice.

[r] *L.* 57, § 1, *D. de acq. vel om. hæred.* See the tenth and following articles of the first section of *Rescissions and Restitution of Things to their First Estate.* The creditors can suffer no manner of inconvenience from a minor's renouncing an inheritance which he had accepted. For seeing there is always an inventory made of the goods when the heir that succeeds is a minor, the said inventory preserves the rights of the creditors, and the minor is as it were an heir with the benefit of an inventory.

his portion, the said coheir will nevertheless remain heir after the minor has renounced. But he will be liable to the charges only for his own portion, and will not be bound for those which fell to the share of the minor; the creditors preserving their rights in order to prosecute them pursuant to the rules which have been explained in the ninth section of the first title.[s]

XVI.

2720. *We must add to the foregoing Rules those of the following Section.* — One may be able to judge by the rules explained in this section, and by the examples of the cases which have been here quoted, what are the acts which may engage one in the quality of heir or executor. And it will be easy to apply to the particular facts which may happen, and to the circumstances, the use of these rules, together with those which shall be explained in the following section.[t]

SECTION II.

OF THE ACTS WHICH HAVE SOME RELATION TO THE QUALITY OF HEIR OR EXECUTOR, BUT WHICH DO NOT ENGAGE ONE IN IT.

ART. I.

2721. *To act as Heir, it is necessary that he who acts should know that he is such.* — The acts which an heir or executor may chance to do whilst he is ignorant of the death of the person to whom he succeeds, and when he acts upon other considerations, put him under no manner of engagement. For to act as heir it is necessary that the person who acts should know that he is such, and that the succession be open, that is to say, that the person to whom he has a right to succeed is dead. Thus, he, who, being presumptive heir to a person that is absent, whether he be instituted by testament or has a right to succeed in case the said person dies intestate, took care of his affairs during his absence, and continues to take the same care after his death, before he knows any thing of his death, does not engage himself to the inheritance. And he

[s] *L.* 61, *D. de acquir. vel omitt. hæred.* See the remark on the foregoing article.

[t] This article is a consequence of the foregoing articles, and of the following section.

would be as little engaged if he were ignorant that he was heir, although he knew of the death of the said person.[a]

II.

2722. *And that the Act proceed from no other Cause.* — It may so happen that an heir or executor, who knows of the death of the person to whom he is to succeed, may do some acts which in their own nature would be reckoned acts of the heir, but which by the circumstances are to be distinguished from them. Thus, for instance, if a son who was living in a house which his father had given him the use of during pleasure continues to dwell in it for some time after his father's death, without declaring his mind whether he will be heir to his father or not; this possession which he has of the house will not be a sufficient reason for concluding that it is as master and owner of the house that he has continued to live in it since his father's death; and it will be no hindrance to him why he may not renounce the inheritance, if nothing else has engaged him in it. For although his precarious title was at an end by his father's death, yet this bare detention of a house which is part of the inheritance, having no relation to the quality of heir, would oblige him only to pay the rent of the house to him who shall succeed as heir, or to the creditors of the inheritance.[b]

III.

2723. *The Heir at Law who knows not that there is a Testament does not approve it by declaring himself Heir.* — It is not always enough to make an heir liable to the charges of the inheritance, that he does some act as heir, even although he knows that he is heir, and also that the person to whom he is to inherit is dead, if he is ignorant by what title he is to succeed. Thus, for example, if one who had right to succeed to a person dying intestate is by

[a] *L.* 19, *D. de acquir. vel omitt. hæred.*; — *l.* 27, *eod.*

[b] *L.* 1, *C. de repud. vel abst. hæred.*; — *l.* 4, *C. und. legit. et unde cognati.* We have in this rule put the case of another house different from that wherein the father of the said person lived, that we might speak only of the fact of the bare dwelling in a house belonging to the inheritance, and to avoid the jumbling together other acts of an heir, which this son would be obliged to prevent, with respect to the movables and papers which should happen to be in the house where the father lived, if after his death the son should continue to dwell in it. For by reason of the said movables and papers, the son would be obliged to get them speedily sealed up, in order to have an inventory taken of them, unless he had a mind to enter heir simply and purely, without the benefit of an inventory. See, in relation to what is said of a precarious possession, the second and thirteenth articles of the first section of the *Loan of Things to be restored in Specie.*

the said person instituted his heir by a testament, and he, knowing nothing of the said testament, enters to the succession as next of kin, and the legatees should come afterwards and set up a testament, which would engage him in such charges that he would choose rather to renounce the inheritance than to keep it, he might abstain from it: and he would cease to be heir in the same manner as one who is instituted by a testament, and who, believing it to be a good will, and not being next of kin, had entered to the succession, of which he should happen to be afterwards deprived on account of the nullities which should be discovered in the said testament.[c]

IV.

2724. *We must distinguish the Motives of the Acts. — First Example.* — Among the acts which an heir or executor may do, it is necessary to distinguish between those which can have no other cause besides an intention which implies the acceptance of the inheritance, and those which may proceed from other causes, and from which it does not necessarily follow that he who does them is heir. Thus, what one does out of a motive of duty, as if the son takes care to bury his father, this office which he does to his deceased parent is not reputed to be acting as heir. Thus, the heir who, while he is deliberating whether he shall accept or not, lays up the effects of the succession in safety, does not declare by that action that he is heir. But in these and the like cases, it is by the quality of the acts, and the circumstances, that we distinguish what is to be looked upon as an acting as heir, and what ought not to have that effect.[d]

V.

2725. *Second Example.* — The heir who, without any design of accepting this quality, but barely to prevent the loss or ruin of a thing belonging to the inheritance, takes some care of it, or, having

[c] *L.* 22, *D. de acquir. vel omitt. hæred.* Although the dispositions of testaments which load the heir too much may be reduced, as shall be shown in the third title of the fourth book, and in the fourth title of the fifth book; yet seeing there may be dispositions which are not subject to this reduction, as shall be explained in the same places, and that other considerations, and even that of being engaged in lawsuits about the said reductions, may oblige the testamentary heir not to accept the conditions of the testament, there may be cases where the rule explained in this article may have its use.

[d] *L.* 20, *D. de acquir. vel omitt. hæred.*; — *d. l.* 20, § 1; — *v. l.* 4, *D. de relig. et sumpt. fun.*

some just reason to believe it to be his own, takes possession of it, does not thereby engage himself to be heir, provided that the circumstances show his intention and his integrity.[e]

VI.

2726. *Another Example.* — If the heir was in partnership with the deceased, to whom he was to succeed, or if they had something in common together, and this partner who was instituted heir, exercising his right, after the death of the other, to the thing which belonged to them in common, does it in such a manner as to restrain himself to his own proper right, without confounding it with the right which belonged to the deceased, and which by the quality of heir had accrued to him; those acts, being confined to his own proper right, will not be a sufficient ground to declare him heir, no more than the care which he may have taken of the thing belonging to him in common with the deceased.[f]

VII.

2727. *When one is forced to act as Heir, it does not engage him.* — If it has happened that an heir has been forced by any person to do some act, which, if he had been at his own free liberty when he did it, would have made him heir, the said force, being well proved, would render the act of no effect, and he would nevertheless be admitted to renounce the succession.[g]

VIII.

2728. *Precautions to be taken by the Heir, who is afraid lest he should engage himself by some Act.* — The heir or executor, who should find himself under a necessity of doing some acts which he feared might be made use of to tie him down to the acceptance of that quality, may beforehand declare his intention by some instrument in writing, wherein he may protest that what he does or shall do shall be without taking upon him the quality of heir, but barely either for preserving the goods of the succession, or for the other causes which may oblige him to act, and which he may specify in his protest. And in this case, if what he has done appears to be sincere, the acts done pursuant to this protest will do him no manner of prejudice. It is by the means of this precaution

[e] *L.* 20, *D. de acquir. vel omitt. hæred.*
[f] *L.* 78, *D. de acquir. vel omitt. hæred.*
[g] *L.* 85, *D. de acquir. vel omitt. hæred.*

that the heirs who are not willing to engage themselves to accept the succession ought in such like cases to provide for their security.[h]

SECTION III.

OF THE EFFECTS AND CONSEQUENCES OF THE ACCEPTANCE OF THE INHERITANCE.

ART. I.

2729. *Two Effects of the Acceptance, the Right to the Goods and the Possession.* — It is necessary to distinguish two effects of the acceptance of the inheritance. One is, that which makes the heir or executor master of all the goods, and of all the rights belonging to the succession, although he be not as yet in possession of them; and the other effect, which is a consequence of the former, is, that he may take possession of them. The heir becomes master of the goods by a bare act, by which he declares or signifies that he is heir, although as yet he possesses no part of the inheritance.[a] And he does not acquire the possession of the goods till he begins to possess them according to the rules which have been explained in the title of *Possession.*

II.

2730. *The Possession is not necessary to one's becoming Heir.* — As soon as the heir or executor has done any act which engages him in that quality, whether he possesses the goods of the inheritance, or a part of them, or even although he has none of them in his possession, yet he may exercise the rights belonging to the heir or executor, and he is likewise bound for all the charges.[b]

III.

2731. *The Acceptance of the Succession is carried back to the Time of the Death which laid the Succession open.* — Seeing the heir or executor, who accepts the succession only some time after

[h] *L.* 20. § 1, *D. de acquir. vel omitt. hæred.*; — *l.* 14, § 8, *D. de relig. et sumpt. fun.*

[a] *L.* 6, *C. de jur. delib.* See the second article of the first section. *L.* 1, *D. de bonor. poss.* See the following article.

[b] *L.* 88, *D. de acquir. vel omitt. hæred.*

the death of the person to whom he succeeds, is reputed heir or executor from the moment of the said death, as has been said in another place;[c] all the goods which augment and all the charges which diminish the inheritance, after the said death, will fall to him. And whatever has been laid out for the preservation of the goods, or acquitting of the charges, whether it was by a curator, if there was any, or by other persons, will be on his account,[d] unless he has good reasons for not approving the said disbursements.

IV.

2732. *Effect of the Acceptance, to oblige to pay all the Charges.* — The heir who is of age, and who has once taken upon him that quality without the benefit of an inventory, enters irrevocably into all the engagements which are the consequences thereof.[e]

V.

2733. *Another Effect, the Right of transmitting the Inheritance.* — There is another effect of the acceptance of the succession, which is the right that it gives to the heir or executor, if he happens to die after this acceptance, to transmit or convey the inheritance to his heir or executor. This is that right which is called the right of transmission of the inheritance, which we shall treat of in its proper place.[f] And it is enough here barely to mention it.

VI.

2734. *In what Sense the Acceptance regards the Goods which do not remain in the Inheritance.* — Although the acceptance of the succession is limited to the goods which remain therein after the death of the person to whom the heir or executor succeeds, and does not extend to those goods to which the right that the deceased had did determine by his death, as has been observed in another place;[g] yet the heir or executor does nevertheless take possession of those sorts of goods, whether it be to preserve them for the persons to whom they are to be restored, as if they were

[c] See the fifteenth article of the first section of the first title.

[d] *L.* 138, *D. de reg. jur.*; — *l.* 28, § *ult. D. de stip. serv.*

[e] See the ninth, tenth, eleventh, and twelfth articles of the first section of the first title, and the sixth section and the other following sections of the same title.

[f] See the tenth section of the title of *Testaments.*

[g] See the fifth article of the first section of *Heirs and Executors* in general.

goods substituted, or even to continue to reap the fruits of them, according to the conditions of the substitution. And he enters likewise into the engagements which the deceased was under in relation to the said goods. Thus, for example, if the deceased had damnified them, the heir or executor would be bound for the damages which the owners had suffered, and for the charges of the said goods which the deceased had failed to acquit during the time that he enjoyed them.

SECTION IV.

OF RENOUNCING THE INHERITANCE.

ART. I.

2735. *Every Heir may renounce the Succession.* — Every heir or executor is at liberty to accept the succession, or to abstain from it, and to renounce it; provided he has not done any act which may have engaged him in that quality.[a]

II.

2736. *How the Succession is renounced.* — The heir or executor, who has a mind to renounce the succession, may do it by acts which signify his intention so to do. Thus, he might cause notice to be given to the creditors, and to the legatees, that he will not accept the succession, and that he renounces it. He might likewise make such a declaration to the person who has the right to succeed in his place. And this renunciation ought to be made either judicially, or otherwise by some act intimated to the party to whom notice ought to be given, and executed honestly and fairly.[b]

III.

2737. *In order to renounce, it is necessary that one should know his Right, and that the Succession be open.* — As in order to act as

[a] *L.* 13, *D. de acq. vel omitt. hæred.*

[b] *L.* 95, *D. de acq. vel omitt. hæred.* Seeing the renunciation of the succession may have consequences which make it necessary that there should remain proofs of it, whether it be for the discharge of the heir or executor who renounces, or for the behoof of the person who has right to succeed in his default, or for the interest of the creditors; the renunciation cannot be well done but by some public instrument in writing, which may be known to all parties concerned.

heir or executor it is necessary that the heir or executor should know the death of the person to whom he is to succeed, and that he should know likewise that he is called to the inheritance,[c] so it is also necessary, in order to renounce the succession, that the heir or executor be not ignorant of the said death, nor of his own right to succeed. For in order to renounce a right it is necessary that the person who renounces should have it in his power to acquire it,[d] and know of it.[e]

IV.

2738. *The Heir who has renounced cannot afterwards retract.* — Although the renunciation of the succession seems to have no other effect but to free him who might be heir or executor from that quality, without obliging him to any thing, yet it has this effect, that he who has once renounced a succession cannot afterwards claim it if the person who had right to succeed in this default has taken his place. Thus the heir who has renounced has engaged himself to the other who succeeds in his place, to let him enjoy peaceably the inheritance, whereof he has relinquished to him all the effects and the charges.[f]

V.

2739. *One cannot renounce the Inheritance in Part.* — As the heir or executor cannot divide his acceptance of the inheritance, to take one part of it, and leave the rest, as has been said in the fifth article of the third section; so neither can he divide his renunciation, by relinquishing one part of the inheritance, and keeping the remainder. But he ought either to renounce the whole succession, or to keep it entire.[g]

[c] See the first article of the second section.

[d] *L.* 18, *D. de acquir. vel omitt. poss.*; — *l.* 4, *eod.*

[e] *L.* 23, *D. de acq. vel omitt. hæred.* This rule has no relation to the renunciations of daughters, of which mention has been made in the preamble of the second section of *Heirs and Executors* in general. For those renunciations concern only successions to come, and are founded on motives which render them lawful and honest, and consequently reasonable; whereas it would be uncivil and unreasonable that an heir should renounce a succession, unless it were under the circumstances mentioned in the article.

[f] *L.* 1, *C. de dolo.* If the heir who has renounced should afterwards repent of it, whilst all things are yet entire, no other person having appeared to claim the inheritance, nothing would hinder him from resuming his right.

[g] *L.* 20, *C. de jure delib.*

TITLE IV.

OF PARTITIONS AMONG COHEIRS.

2740. It is an engagement which all persons are under who have any thing in common among them, to come to a partition when any one of them desires it. For they may, indeed, all of them have the joint enjoyment of the thing which belongs to them in common, if this undivided enjoyment thereof be agreeable to them, and suit with their conveniency; but if any one of them is desirous to have his portion to himself, it would be contrary to justice and to good manners to force him to have it always undivided, since that would be a perpetual occasion of strife and contention among them, as has been observed in another title.[a]

2741. As we have explained in the same place the mutual engagements of those who have any thing in common together without a covenant, so we have there set down the rules which have relation to their engagement of dividing the common thing, and the said rules may be applied to partitions among coheirs. But since we have not there explained this kind of partition in particular, nor even in general the nature of partition, which is of greater extent among coheirs than among all other persons, we shall explain in this title all that belongs to this matter, both what has not been explained in that other title, and what is necessary to be explained here.

2742. If any reader shall find fault, that we have not inserted under this title that rule of the Roman law which relates to partitions which parents may make of their goods amongst their children, he may see what is said on this subject in the preamble of the first section of the title of *Testaments*.

2743. It is proper to acquaint the reader here, that although it might be expected that we should explain under this title the matter of collation of goods which the coheirs are bound to bring into the mass of the inheritance, in order to be comprised in the partition, yet we shall not treat of it here. For this matter takes in a great many particulars which ought to be distinguished from the matter of partitions, and it shall be explained in a separate title by itself, which shall be the fourth of the second book.

[a] See the eleventh article of the second section *Of those who chance to have*, &c.

SECTION I.

OF THE NATURE OF PARTITION, AND IN WHAT MANNER IT IS MADE.

ART. I.

2744. *Definition of Partition.* — The partition of the goods of the inheritance among coheirs is nothing else but the exercise of the right, which they have all of them reciprocally, to take out of the goods which belong to them in common each of them one portion separated from the portions of the others, which is to be to him in lieu of the undivided share which he had in the whole.[a] And it is the same thing in all other partitions of a thing which two or more persons have in common. For those who have any thing in common among them cannot be compelled to possess it always jointly and in common. Thus, every one of the coheirs may oblige the rest to come to a partition of the inheritance.[b]

II.

2745. *Partition is as an Exchange.* — It follows from this nature of partition, that it is as it were an exchange, which the parties who divide make among themselves; the one giving his right in the thing which he relinquishes for the other's right in that which he takes to himself. Thus, for instance, when, in a partition among two coheirs, the one takes a certain estate in land for his share, the other a house, he who takes the land retains the right which he himself had to the one half of it, and acquires the right which his coheirs had to the other half; and he who takes the house retains in the same manner the right which he himself had to the one half of it, and acquires the other half which belonged to the other.[c]

III.

2746. *Or as a Sale.* — The partition being considered under another view may be compared to the contract of sale. For although one of the coparceners does not buy any thing from the other, yet they estimate among themselves that which they are to divide, and every one of them takes a share of the goods in pro-

[a] *L.* 1, *D. fam. ercisc.*; — *l.* 8, *C. eod.*

[b] *L.* 43, *D. fam. ercisc.* See the eleventh article of the second section *Of those who chance to have any Thing*, &c.

[c] *L.* 77, § 18, *D. de legat.* 2; — *l.* 20, § 3, *in f. D. fam. ercisc.*

portion to the share which he had in the price which they set upon all the goods of the inheritance.[d]

IV.

2747. *All the Goods of the Inheritance are divided.* — The partition ought to take in all the goods without exception, movables and immovables, rents, debts owing to the estate, and, in general, all sorts of effects whatsoever that are in the succession, and which ought to go to the heirs.[e] We must likewise take in among the goods that are to be divided, those which the heirs, or any one of them, are bound to bring into the mass of the inheritance, pursuant to the rules which shall be explained in the title of *Collation of Goods*. But if, after the partition has been made, there should appear goods which had not been comprised therein, it would be reformed, or a new partition would be made, either of the whole estate, or only of those goods which were omitted.[f]

V.

2748. *And likewise all the Charges.* — As the heirs divide all the goods of the inheritance which they know of, so they ought

[d] *L.* 1, *C. comm. utriusque judic. tam famil. q. c. d.* Seeing the valuations which coheirs make among themselves of the goods which they divide are of no other use but to facilitate the giving to every one of them so much of the goods as he ought to have for his portion, this comparison of partition to the contract of sale is limited to the idea which is given of it in this article; and as it has not the other marks of this contract, so it ought not to have the consequences thereof. Thus, the coheirs who divide the goods of the inheritance are not bound to pay the fines of alienation, and the other dues which might be demanded in a contract of sale, not even as to the moneys which one of the coheirs may be obliged to pay in to his coheir to make their shares equal, which is called the balance of the partition. Which happens when it is not possible to divide all the goods of the succession in such a manner as to make all the portions equal, as when there are some goods that cannot be divided, and which exceed the value of one share; or when it is altogether impossible to divide the goods into equal portions without obliging the one to pay in some money to the other for rendering the shares equal. For in these cases there is this difference between the money given for balancing the shares, and the price in a sale, that in the contract of sale the buyer had no right in the thing that is sold, and he purchases it entirely by a commerce, wherein he engages himself voluntarily. But in a partition, he who pays in the money had a right in the whole thing which he takes, and a right which came to him by a title independent of his will. Thus he does not buy any thing, but being engaged to take for his portion some of the goods which are of greater value than what his share amounts to, he is obliged to make the condition of his coheir equal to his own. So that this return of money being only an accessory that is essential to the partition, it does not change the nature of it, but becomes a part thereof, and does not give to the partition the characters of a contract of sale, which are quite different.

[e] *L.* 2, *D. famil. ercisc.*: — *l.* 25, § 20, *eod.*

[f] *L.* 20, § 4, *D. fam. ercisc.*

likewise to divide the debts owing by the deceased, and the other charges. For there are no more goods than what remain after all the charges are deducted.[g]

VI.

2749. *Warranty for Evictions, and for the Charges.* — If after the partition there appear any new charges, whether they be debts or others, or if any of the lands divided be evicted, the heirs shall warrant one another against such evictions, and shall do one another justice reciprocally, either by a new partition or otherwise, pursuant to the rules which shall be explained in the third section.[h]

VII.

2750. *Equality of the Condition of the Coparceners.* — The goods and the charges are divided among the coheirs according to the portions which they have in the inheritance, so as that what every one has for his portion be estimated on the same foot with what the others have for theirs; and that they bear likewise their respective proportions of the charges, making their condition always as equal as is possible, both as to the advantages and disadvantages in the goods and in the charges.[i]

VIII.

2751. *If the Equality cannot be exact, in what Manner it is to be supplied.* — If the goods and charges which are to be divided are of such a nature that it is not possible to give to all goods of the same quality, and to divide the charges equally, and in such a manner as that the condition of every one may be equal to that of the others, this equality is made up by joining to the goods of the greatest value the heaviest charges, or by indemnifying in some other way those who should suffer any disadvantage, either by returns of money from one share to another, or by other accommodations which may as much as is possible render equal the condition of the coheirs. Thus, for example, if in order to have the use of a house, or other tenement, which falls to the lot of one, it should be necessary to subject to some service another house or tenement which is in the lot of another, this service ought to be established,

[g] *L.* 1, *D. de bonor. possess.*; — *l.* 39, § 1, *D. de verb. signif.*
[h] *L.* 25, §§ 20 *et* 21, *D. fam. ercisc.* See the third section.
[i] *L.* 19, *in f. D. fam. erciscund.*

and the inconvenience thereof ought to be otherwise made amends for, either by the valuation of the lands and tenements, or in some other manner. And, in fine, the coparceners ought mutually to bear with some inconvenience for the ease and conveniency of one another, and always to prefer that which is most advantageous for them all in general, to what might be for the interest of any one of them in particular.[l]

IX.

2752. *What the Deceased owed to the Heir is reckoned Part of the Charges.* — We must reckon among the charges of the inheritance that which the deceased may have owed to one of the heirs. For here the quality of debtor is not confounded with that of creditor any farther than for the share which this heir ought to bear of his own debt, and he will remain creditor to the other heirs for all the overplus.[m]

X.

2753. *The Goods which cannot be divided are to be sold by Auction.* — When there are in the inheritance such kinds of goods as are not capable of being divided, such as an office, or a house which cannot be divided, or other effects which none of the heirs either can or is willing to take, whether it be because of the price, or for other reasons, which may make it necessary to sell the goods in order to divide the price of them, they are sold by auction, as has been said in another place;[n] or if any one of the heirs is willing to take the goods that are to be sold, at the price which they shall agree on among themselves, he shall have a less share of the other goods, or shall refund to the others that which they ought to have out of the goods which he keeps to himself.[o]

XI.

2754. *The Auction may be made publicly.* — Seeing this sale by auction is to be for the common good of the coheirs, every one of them may demand that it be public, may bid himself for the thing exposed to sale, and insist that all persons be received to

[l] *L.* 22, § 4, *D. fam. erciscund.*; — *l.* 22, § 3, *eod.*; — *l.* 4, *in f. D. comm. divid.*; — *l.* 21, *D. eod.*

[m] *L.* 20, § 1, *D. fam. erciscund.*

[n] See the twelfth article of the second section *Of those who chance*, &c.

[o] See the same article. *L.* 55, *D. fam. ercisc.*

bid, in order to raise the price of that which none of the coparceners either could or would take in his lot.[p]

XII.

2755. *If the Thing is adjudged to one of the Heirs as being the Highest Bidder, the others cannot claim any Share of it by offering their Share of the Price.* — If it is one of the heirs to whom the thing that is sold by auction is adjudged, he shall remain sole and unchangeable proprietor of it, and none of the other heirs shall have right to claim any share in it by paying in his part of the price, even although it were a thing that were capable of being divided. For it is a voluntary and irrevocable alienation, and he to whom the thing is adjudged may say that he did outbid others in the price only, that he might have the whole to himself; and the others cannot divide his title.[q]

XIII.

2756. *Where the Deeds belonging to the Succession are to be lodged.* — As the partition of the goods and right of the succession gives to every one of the heirs in particular that which falls to his share, so likewise each of them ought to have only the deeds and writings which relate to the goods and rights which he has in his lot. And if there are any writings which are of common use to several of the heirs, the principal heir keeps possession of the originals, which he is to exhibit whenever there is occasion, and in the mean while he gives copies of them to the others; or if they do not agree to dispose of them in this manner, the writings are deposited in the hands of a public notary, or they will be otherwise disposed of, as the judge shall direct.[r] And as for the dispositions of the deceased, whether they be a testament, codicil, or others, they remain in the hands of the notary before whom they were sped, that he may give authentic copies of them to the heirs; or if they happen to be among the papers of the testator, or in the custody of other persons, they are either disposed of according as the heirs do agree among themselves, or if they cannot agree, the judge will give directions therein.[s]

[p] *L.* 3, *C. comm. divid.* See the place quoted on the foregoing article.

[q] This is a consequence of the sale by auction, which was only done in order to alienate the thing which either could not be divided, or which the heirs were not willing to divide, that they might share the price among them. *V. l.* 7, § 13, *D. comm. divid.*

[r] *L.* 7, *D. fam. ercisc.*

[s] *L.* 4, § *ult. D. fam. ercisc.* See the sixteenth article of the second section *Of those who*

XIV.

2757. *Who is the Plaintiff in a Demand of Partition.* — If, in order to have a partition, the coheirs go to law with one another, seeing they all demand that which falls to their share, and that their engagements are reciprocal, they are therefore all of them in the place of plaintiffs, in the same manner as in the other kinds of partitions of things that are common. But although they are all in effect plaintiffs in that respect, yet he is only considered as plaintiff who first began the suit. For in judicial proceedings this quality is not regulated by the nature of the rights which those that go to law together have one against the other, but by the first demand that brings the matter into judgment.[t] Thus, even in causes where only one person is obliged towards the other, as a debtor to his creditor, who has naturally on his side the right to demand that which is due to him, it may happen that this debtor becomes the plaintiff; as if he summon his creditor to deliver him up a bond which he pretends to be null or discharged, or to apply towards payment of the said debt a sum which he has already paid. For these are in effect demands which he makes to his creditor.

XV.

2758. *A New Partition for an Heir who appears afterwards.* — If it should happen that, after the partition was made, there should appear a new coheir or coexecutor, whose long absence had given occasion to believe that he was dead, or whose right was unknown, as if a second testament which was not known of had called him with the others to the succession, this first partition would be annulled, and it would be necessary to make a new partition with him of all the goods that are still in being, and of the value of those which have either been consumed or alienated, that he may have his portion of the whole inheritance.[u]

XVI.

2759. *Wrong done in a Partition.* — When there is any considerable wrong done in a partition, even although the coparceners

chance to have, &c. This article is conceived in such terms as to make it conformable to the usage in France.

[t] *L.* 2, § 1, *D. comm. divid.*

[u] *L.* 17, *C. fam. ercisc.*

should all of them be of age, yet this damage may be repaired, pursuant to the rule explained in another place.[x]

XVII.

2760. *Three Ways of making a Partition.* — Partitions may be made three ways; either by the heirs themselves, if they know the value of the things and can agree among themselves; or by arbitrators or skilful persons, whom they choose by mutual consent; or judicially, if they cannot agree among themselves; in which case the partition is made by skilful persons, who are named by the judge, if the heirs themselves do not every one of them name some persons on their part.[y]

SECTION II.

OF THINGS WHICH ENTER OR DO NOT ENTER INTO THE PARTITION; AND OF THE EXPENSES LAID OUT BY THE HEIRS OR EXECUTORS, WHICH THEY MAY RECOVER.

2761. We shall not put down here among the goods which enter into the partition, those which are liable to be brought into the mass of the inheritance by way of collation, although they are to be divided as well as the others, because the matter relating to the collation of goods is explained in another place, as has been mentioned at the end of the preamble of this title.

ART. I.

2762. *Three Sorts of Goods which a Person deceased may have had.* — We must distinguish among the goods which dying per-

[x] See the fourteenth article of the second section *Of those who chance*, &c., and the remark that is there made upon it See likewise the ninth article of the sixth section of *Covenants*, and the fourth article of the third section of the *Vices of Covenants*, and the third article of the third section of *Rescissions*.

[y] *L. ult. D. fam. ercisc.* A partition may be made by mutual consent, whether it be that the heirs do it themselves, or by arbitrators or skilful persons. And if they do not agree among themselves, the partition is made by a decretal order of the judge, in which case every one of the parties names skilful persons on his side, or if the parties refuse to name, the judge names them. And this is a nomination which the judge makes by virtue of his office; which does not hinder the parties from giving in their reasons of recusation against the persons named by the judge, in order to have other skilful persons named who are not suspected. See the twenty-first title of the ordinance of the month of April, 1667.

sons leave behind them three different sorts which they may have had. The first is of those goods wherein the right which the deceased had to them ceased by his death, such as those of which he had only the usufruct, or which were subject to a substitution, and others of which mention has been made in the fifth article of the first section of the first title. The second is of those goods which the deceased may have given away in legacies, or otherwise, to other persons than his heirs or executors. And it is this third sort of goods which come into partition or distribution, whether the deceased died testate or intestate.[a]

II.

2763. *In what Case Goods bequeathed or substituted may enter into the Partition.* — Although the things bequeathed by a testator, and the goods which he may have had that were subject to a substitution, or to a fiduciary bequest, are not comprised among the goods of the succession, which are to be divided among the heirs; yet nevertheless, if the legacy was conditional, so that the legatee was not to have the thing bequeathed but upon a condition, or in a case which it was altogether uncertain whether it would happen or not, or that the fiduciary bequest was only to take place in a time which was not as yet come; in all these cases the heirs might in the mean while divide those kinds of things, they taking among themselves the necessary precautions for the events which might oblige them to restore the goods, and giving to the legatees, and to the persons who may have right to the substituted goods, the security which shall be spoken of in its proper place.[b]

III.

2764. *The particular Legacies which are given to any of the Heirs or Executors do not enter into the Partition.* — We may reckon among the things which do not enter into the partition that which a testator gives as a particular legacy to some one of his heirs or executors, over and above his equal share with the others. For that heir or executor is to take the said thing before the partition.[c]

[a] *L.* 2, *D. fam. ercisc.*

[b] *L.* 12, § 2, *D. fam. ercisc.*; — *l.* 96, § *pen. D. de leg.* 1. See the seventh article of the tenth section of *Legacies*, and the nineteenth article of the first section of *Substitutions* both direct and fiduciary.

[c] *L.* 17, § 2, *D. de legat.* 1.

IV.

2765. *The Goods which are to be restored are not divided.* — We must likewise exclude from the partition all those goods of the succession that have been acquired by ways which oblige the possessors to restore them; such as things that have been got by stealth or robbery.[d]

V.

2766. *Nor the Things which can only serve for some ill Use.* — We ought likewise to place in the same rank those kinds of things which can be applied only to some ill use, such as books of magic, and other things of the like nature, which ought to be suppressed.[e]

VI.

2767. *The Revenues which every Heir has received come into the Partition.* — Besides the goods which are extant in the inheritance at the time of the partition, or which ought to be brought into it by way of collation, the mass of the inheritance ought to be augmented with the fruits and revenues of the common goods which every one of the heirs may have enjoyed by himself, for he ought to be accountable for them, pursuant to the rule explained in the third article of the twelfth section of *Heirs and Executors* in general, and the said fruits are a part of the goods of the succession which come into the partition.[f]

VII.

2768. *The Expenses laid out about the Fruits are to be deducted out of them.* — The expenses which the heirs or executors have

[d] *L.* 4, § 2, *D. fam. ercisc.* See the last article of the second section *Of those who chance*, &c.

[e] *L.* 4, § 1, *D. fam. ercisc.* See the seventeenth article of the second section *Of those who chance to have*, &c.

[f] *L.* 20, § 3, *D. de hæred. pet.*; — *l.* 2, *in f. C. de pet. hæred.* See the third article of the twelfth section of *Heirs and Executors* in general, and the texts which are there cited. It is in the sense explained in this article that we ought to understand what is said in these texts, that the fruits augment the inheritance. But if the goods of a succession were to be estimated, in order to adjust, for example, the Falcidian portion or the legitime, we ought not in that case to comprise in the said estimate the fruits and other revenues which the heirs who were in possession of the inheritance may have enjoyed. For the said fruits would not increase the mass of the goods of the deceased; but they would be only an accessory, which would belong to every one of the heirs according to his share in the inheritance. See the seventh article of the first section of the *Falcidian Portion*, and the eleventh article of the third section of the *Legitime*.

been at, either in cultivating the lands, or in gathering and preserving the fruits, are to be deducted out of the fruits which they are bound to account for to one another. So that there enters into the partition only so much as remains of the clear value of the fruits, after the expenses are deducted.[g]

VIII.

2769. *Although there be no Fruits, yet the Heir recovers the Charges he has been at in cultivating the Lands.* — Although the expenses laid out by one of the heirs or executors, in order to reap the fruits, such as those for cultivating the lands, and others of the like nature, happen to be ineffectual, either when there is no crop at all, or when the crop is less than the expenses; yet the heir or executor who had laid them out will nevertheless recover them, for they were necessary for the common interest.[h]

IX.

2770. *The Heirs recover the Necessary and Useful Expenses, although the Event makes them Unprofitable.* — It would be the same thing if an heir or executor had been at any expense to preserve any of the goods belonging to the inheritance, even although the thing on which the expense was laid out should happen to perish, as if a house which he had caused to be propped up in order to prevent its fall was afterwards consumed by fire. For there is this difference between the condition of this heir or executor, as of every honest and fair possessor, and that of an unjust possessor, that whereas the unjust possessor cannot recover the necessary or profitable expenses which he has laid out on the thing which he possessed unjustly, unless the thing itself is still in being, and is improved by the said expenses, and that, on the contrary, he loses his expenses if the thing has perished, or is noways the better for what has been laid out upon it; the heir or executor, and every other honest and fair possessor, recovers these sorts of expenses, although the thing be totally destroyed.[i]

X.

2771. *Three Kinds of Expenses.* — Among the expenses which an heir or executor may have laid out on the goods belonging to

[g] *L.* 36, § *ult. D. fam. ercisc.*
[h] *L.* 37, *D. de hæred. pet.* See the following article.
[i] *L.* 38, *D. de hæred. pet.*; — *l.* 51, *D. fam. ercisc.*

the inheritance, we must distinguish three sorts of them. Those which are necessary; those which, although not necessary, are nevertheless useful; and those which have been laid out only for pleasure, without any necessity, and without any profit.[1] And according to these differences, the heir or executor recovers or does not recover his expenses, by the rules which follow.

XI.

2772. *Necessary Expenses.* — The necessary expenses are those which one is obliged to lay out in preserving the goods, and for preventing their perishing, or being damaged; such as the ordinary repairs in buildings, those which are made to prevent their fall, that which is laid out in planting new trees in the room of others that are dead, or blown down, and other such like expenses, the want of which would cause some damage to the inheritance; which is the reason why the heirs who have been at any expenses of this kind ought to recover them.[m]

XII.

2773. *Useful Expenses.* — The useful expenses are those which, although they are laid out without necessity, yet augment the estate; such as the planting of an orchard, or some additional building to a house, in order to raise the rent of it. And these sorts of expenses ought to be repaid to the heirs or executors who have laid them out.[n]

XIII.

2774. *Expenses laid out for Pleasure.* — The expenses which, being neither necessary nor useful, are laid out only for pleasure, such as a superfluous building, water-works, painting, carving, and others of the like nature, which an heir had laid out, knowing that he had coheirs, are not recoverable, and he who has laid them out ought to blame himself for it.[o] But this justice may be done him,

[1] *L.* 1, *D. de impens. in res dot. fact.* Although this law has relation to another matter, yet it may be applied here, as likewise those which are cited on the following articles. See, touching the several sorts of expenses, the eleventh article and the other following articles of the third section of *Dowries*, and the sixteenth and following articles of the tenth section of the *Contract of Sale*.

[m] *L.* 1, § 1, *D. de impens. in res dot. fact.*; — *d. l.* 1, § 3; — *l.* 79, *D. de verb. signif.*; — *v. l.* 39, *D. de hæred. petit.*

[n] *L.* 5, § *ult. et l.* 6, *D. de impens. in res dot. fact.*; — *l.* 7, *in f. eod.*; — *l.* 79, § 1, *D. de verb. signif.*; — *d.* § *in fin.*

[o] *L.* 7, *D. de impens. in res dot. fact.*; — *l.* 79, § 2, *D. de verb. signif.* Ex duobus fratri-

to leave, if it is possible, in his lot the land or tenement on which the said expenses have been laid out, without estimating it at a higher rate upon that account, or even to reimburse the said heir of so much as the land or tenement on which the said repairs have been made is really the better for them; for in that case these expenses would be useful. But if the said heir had laid out these kinds of expenses, being ignorant that he had any coheirs, and looking upon himself to be the sole owner, it would be but just and equitable that he should suffer no manner of prejudice from his honest and fair dealing, and that some regard should be had thereto in the partition, according as the circumstances might require.[p]

XIV.

2775. *Expenses for Pleasure which are Useful.* — We must not reckon in the number of expenses made for bare pleasure those which are laid out in embellishing a land or tenement, or other thing which is the more salable by reason of the said ornaments.[q]

XV.

2776. *Damages against the Heir who delays the Partition.* — If one of the heirs should refuse to divide the goods of the succession, and to bring into it things which are liable to perish, such as cattle that are in his possession, and it should happen during his delay that these sorts of things, which might have been sold, did really perish, he would be liable for them, because this loss might be imputed to him. Which is to be understood only of the cases where, there being no dispute among the heirs as to the right of any of them to the succession, he who puts off the partition could have no reasonable excuse for his delay. But if an heir who is in possession of the inheritance fairly and honestly, believing

bus uno quidem suæ ætatis, alio vero minore annis, cum haberent communia prædia rustica, major frater in saltu communi habenti habitationes paternas, ampla ædificia ædificaverat, cumque eundem saltum cum fratre divideret, sumptus sibi, quasi re meliore ab eo facta, desiderabat, fratre minore jam legitimæ ætatis constituto. Herennius Modestinus respondit, ob sumptus nulla re urgente, sed voluptatis causa factos, eum de quo quæritur, actionem non habere. *L.* 27, *D. de negot. gest.* Although this brother mentioned in the text could not perhaps claim in the rigor of the law to be reimbursed of these kinds of expenses, yet equity would seem to require that some amends should be made him some other way, as is explained in the article.

[p] *L.* 39, § 1, *D. de hæred. petit.*

[q] *L.* 10, *D. de exp. in res dot. fact.*

himself to be sole heir, should contest the right of one who, pretending likewise to be heir, should demand of him the goods of the succession; these sorts of losses which should happen during their controversy ought not to be imputed to him. For it would be as an unforeseen accident. And even although he had foreseen it, yet the fear of this event would not oblige him to abandon the right which he pretended to have singly to the goods of the inheritance.[r]

SECTION III.

OF WARRANTIES BETWEEN COHEIRS, AND OF THE OTHER CONSEQUENCES OF THE PARTITION.

2777. It is not necessary to repeat here what is meant by warranty, nor the general rules relating to this matter, which have been explained in the title of the *Contract of Sale;*[a] and in this section we shall treat only of the rules which are peculiar to the warranty between coheirs.

Art. I.

2778. *Warranty is reciprocal among the Coheirs.* — As coheirs have their portions of the inheritance by the same title and the same right which is common to them, so their condition ought to be the same; and they ought all of them to have the same security for what is given them as their shares. Thus, the partition of the inheritance implies the condition, that the portions of the coheirs shall remain bound reciprocally for the warranty of one another,[a] by the rules which follow.

II.

2779. *Two Different Effects of this Warranty.* — We must distinguish two different effects of the warranty between coheirs, according to two different kinds of goods that may be in the succession. One is of those things which are really in being, movables or immovables, and which may be seen and touched, such as a

[r] *L.* 40, *D. de hæred.*

[a] See the third article of the second section of the *Contract of Sale*, and the tenth section of the same title.

[a] *L.* 25, § 21, *D. fam. ercisc.*

horse, a suit of hangings, jewels, and other movables; a house, a vineyard, a field, and other immovables. The other is of rights, such as a bond, a rent, a sentence or judgment, a transaction, or other title which may create a debt, or some other right.[b] In the partition of things which are really in being, and may be seen and felt, the warranty is, not that those things do really exist and are in being, for that every one sees. But since it is possible that they may be no part of the inheritance, if it should happen that any one should claim a right of property in them, the heirs ought to warrant one another that the said goods are really and truly a part of the succession.[c] And in the partition of the debts due to the succession, and of the other rights, since one may be ignorant whether there be any such debts or rights at all belonging to the estate, or not, whether a rent be still due, or whether it has been redeemed, if an obligation is annulled by payment, or by some other cause; the warranty for debts and rights implies that they not only are a part of the inheritance, but that they actually are such as they appear, that they are really and truly due, and that they do belong to the heir to whose lot they fall;[d] unless it be that this warranty has been otherwise regulated among the heirs, as shall be said in the fourth article.

III.

2780. *Warranty for the Debts due from the Succession, and the other Charges.* — Besides this warranty which the heirs owe to one another with respect to what enters into the partition, that what every one has in his lot is a part of the inheritance, and that it belongs to no other person, they ought likewise to warrant one another against all suits at the instance of the creditors to the succession, or of others who shall pretend to have mortgages, or other securities, on that which has fallen to the lot of one of the heirs.[e]

IV.

2781. *The Heirs may regulate differently the Warranties.* — The warranties explained in the two preceding articles are natural and just. And although no mention had been made of them in the

[b] *Inst. de reb. corp. et incorp.*

[c] *L.* 25, § 21, *D. fam. ercisc.* See the second and third articles of the first section.

[d] *L.* 4, *D. de hæred. vel act. vend.*; — *l.* 74, § *ult. D. de eviction.* Although these texts respect other matters, yet they may be applied here.

[e] See the following article.

partition, yet they would be tacitly implied, and the heirs would be reciprocally obliged to them. But if they agree either to add to these warranties, or to take any thing from them, their agreement will be to them instead of a law. Thus, for the debts owing to the succession, they may agree that they shall warrant one another, not only that they are due, but likewise that the debtors are solvent, and will pay the debts, or that the heirs will make them good to one another, either after a bare refusal of payment from the debtor, or after the using of such diligence for recovery of them as they shall agree on. And they may, on the contrary, divide the said debts without any warranty on the one part or the other, not even as to those which may happen to have been acquitted, or of which perhaps there remains nothing due for some other reason. Which may be equitable upon several considerations, as, among others, if they were heirs to a merchant who sold by retail, and who had left behind him a great many small debts, the warranting of which would only give occasion to a great many lawsuits.[f]

V.

2782. *The Heirs warrant one another for their respective Proportions of the Charges.* — If in the partition of a succession, which is burdened with debts or other charges, the heirs have engaged to one another to acquit each of them some part of the said debts and charges, they shall reciprocally warrant one another against them, and every one shall acquit the charges which he has taken upon himself. And if they have made no agreement touching this matter, they must acquit the charges in proportion to the shares which they have in the inheritance, and every one of them shall warrant the others for his portion of the charges.[g]

VI.

2783. *And for those which appear only after the Partition.* — If after the partition there should appear any new debts, or new charges, which were not known of before, as if some of the lands should appear to be burdened with a ground-rent, or with other charges besides the usual duties of quitrents, and others of the like nature, or that some part of the goods should appear to be subject to a substitution, these new charges, whatever kind they

[f] *L.* 14, *C. fam. ercisc.* See the twenty-fourth and following articles of the tenth section of the *Contract of Sale.*

[g] *L.* 1, *C. si cert. petatur.*

were of, would regard all the heirs, and they would reciprocally warrant one another against them.[h]

VII.

2784. *The Casualties after the Partition regard those to whom they happen.* — The losses which may happen by casualties after the partition regard him to whose lot the thing has fallen which perishes, or is damaged. As if it was grain, liquors, beasts, or other things subject to these kinds of losses, or a land or tenement situated on the bank of a river, which has been carried away by a flood, or a house burnt down by fire. For in all these cases, and even those that are the least foreseen, the thing not being any more in common, he whom the partition has made master of it suffers the loss thereof.[i]

VIII.

2785. *The Heir is bound for a Loss which has happened in Consequence of an Act which he may be blamed for.* — If, by a consequence which may be imputed to the act of one of the heirs, there happens some loss or damage to any of the goods of the inheritance, he shall be liable for it. Thus, for example, if an heir having committed some crime or offence, and his goods being seized, some of the goods belonging to the inheritance had been seized among them, and this seizure had been attended with the loss of some profit or income which might have been drawn from the said goods, or the said goods had been damaged by the seizure, or it had occasioned other damages, he whose crime or offence had had this consequence would bear singly the loss which his own act had occasioned, and he would warrant his coheirs against it.[l] And it would be the same thing, although this heir had committed no offence, if the damage proceeded from his act. As if a creditor to the inheritance, whom he was obliged to pay off, had caused other goods of the succession to be seized than those which had fallen to his lot. For in this case he would be accountable for the damages that his coheirs might suffer thereby.

[h] *L.* 2, *C. de hæred. pet.*

[i] *L.* 6, *C. de pignor. act.*

[l] *L.* 20, *D. comm. divid.* We have given in this article another example than that mentioned in the law which is here quoted, to make the rule conformable to the usage in France, by which contumacy is not punished with that rigor which sometimes may be unjust. But this matter does not belong to this place.

IX.

2786. *The Heir who disposes of any Thing privately bears alone the Losses which attend it.* — If any one of the heirs disposes by himself of any of the goods belonging to the inheritance, with design to make an advantage thereby to himself, without the privity of his coheirs, as if he sells a thing, lets it out to hire, or farms it out, he shall not only be bound to pay in to his coheirs the profit which he shall have made by it; but if his act is attended with any loss, as if the person to whom this heir has sold or let the thing proves insolvent, he alone shall bear the loss which happens, instead of the profit which he designed to have made by it for himself. And he shall be answerable to his coheirs both for the rents of the lands and tenements which he has let or farmed out, and for the value of the goods which he has sold.[m]

[m] *L.* 6, § 2, *D. comm. divid.*; — *v. l.* 5, *C. de ædif. priv.* What is said in this text of a partner may be applied to a coheir.

BOOK II.

OF LEGAL SUCCESSIONS, OR SUCCESSION TO INTESTATES.

2787. HAVING explained in the first book all that belongs in common both to legal successions, or succession to intestates, and to testamentary successions, we must now proceed to the matters which are peculiar to these two kinds of successions, and explain the detail of each of them in their order. As to which it is necessary to observe, that in the books of the Roman law the testamentary successions have the first place;[a] but we have thought it more natural to begin with the succession of intestates; and that chiefly for two reasons. The first is, because, as has been remarked in another place,[b] the successions to intestates are more natural than the testamentary successions, and of a much more universal and more necessary use, seeing we might do very well without the testamentary successions, but the legal successions, or successions to intestates, are absolutely necessary. And the customs of France own none else for heirs but those of the blood and family of the deceased. So that it may be said that the testamentary successions are, as it were, exceptions to the natural law of legal successions, and that the liberty of disposing of one's estate by testament, in favor of other persons than the heirs of blood, and especially the power of making other heirs, is as it were a dispensation from the common and universal rule, which calls the heirs of blood to the successions. Thus, as it is necessary to know the common order itself, before we inquire into the changes which have been made in it, so the matters relating to the succession of intestates ought to take precedence. And before we treat, for

[a] *L.* 1, *D. si tab. test. ull. ext.*

[b] See the preface to this second part, no. 8.

instance, of the liberty which a testator has to dispose of his goods by testament to the prejudice of his children, it is necessary to know that the children ought naturally to succeed to their father.

2788. The second consideration which has induced us to begin with the legal successions is, that the matters belonging to these successions are much shorter, and much easier, than the matters concerning testaments, which contain a vast number of particulars, full of different sorts of difficulties; and that it is the method in all arts and sciences to begin, as much as is possible, with that which is easiest, and which leads to the knowledge of what is most difficult. Thus, we had reason to believe that it would be on one side more natural to give to the legal successions the first rank, in which they are placed by the order of the society of mankind, which regulates the use of successions; and that on the other side it would be more methodical, in explaining these two matters which ought to be distinguished, to observe the order and method of sciences, which requires that that which is most simple, most easy, and most natural, should precede that which is more intricate, more difficult, and less natural. And although it is true, that, when the question is to judge, in any particular case, who it is that is to succeed, it is necessary to begin by inquiring whether there is any testament that may have its effect, because, if there is any such, the testamentary heir excludes the next of kin;[c] yet it does not follow from this bare consideration, which relates only to the question who shall succeed, that in general the right of succession by testament is a matter whereof the rules ought to precede those which belong to the succession of intestates. For the order of the questions that occur in any cause, and the order of the rules by which they are to be decided, have nothing belonging to them in common.

2789. It is not necessary to point out here the particular order of the several matters which compose this second book, *Of Legal Successions, or Succession to Intestates;* since that appears sufficiently by the titles of the said matters. Neither shall we take up any time here to explain the principles of natural equity, which transmit the successions to the heirs of blood. The reader may see on this subject what has been said concerning it in another place.[d]

[c] *L.* 8, *C. comm. de succes.*

[d] See the preface to this second part, no. 4.

2790. There are three orders or persons who succeed to intestates: that of children and other descendants; that of fathers and mothers and other ascendants; and that of brothers and sisters and other collateral relations. And these three orders shall be the subject-matter of the first three titles of this book. We may add, as a fourth order of heirs to intestates, that which in default of relations calls the husband to the succession of his wife, and the wife to the succession of her husband.[e] But this kind of succession being reduced to one single rule, it is not necessary to distinguish it under a separate title; and we shall add it in a section at the end of the third title.

TITLE I.

IN WHAT MANNER CHILDREN AND OTHER DESCENDANTS SUCCEED.

SECTION I.

WHO ARE THE CHILDREN AND DESCENDANTS.

ARTICLE I.

2791. *Who are the Children.* — By children are meant properly those who are in the first degree, that is to say, the sons or the daughters who are born immediately of the person to whom they are to succeed. And the name of children is likewise given in a second sense to all the descendants which are spoken of in the following article. And when we would distinguish these from the children of the first degree, we give them the name of grandchildren.[a]

II.

2792. *Who are the Descendants.* — The descendants are those who are born of the son or daughter; whether they be in the second degree of grandson, granddaughter, or in the third degree, or

[e] See the preface to the second part, no. 11.

[a] *L.* 220, *D. de verb. signif.*; — *v.* § *ult. Inst. qui test. tut. dar. poss.*

other more remote degree. For whatever degree they are in, at ever so great a distance, they are called descendants, or grandchildren; and they have likewise the general name of children of those of whom they are descended.[b]

III.

2793. *All Descendants are included under the name of Children.* — Under the name of children and descendants are comprehended sons and daughters, grandsons and granddaughters, without distinction either of sex or degree, and whether they be descended of sons or of daughters, and whether they be under the power and authority of their father or not.[c]

IV.

2794. *Bastards are not comprised under the name of Children.* — By the name of children are understood only those who are lawfully begotten; and this name is not given to bastards, but when it is accompanied with some addition, such as that of natural children, or some other which may distinguish their condition from that of legitimate children. And when the question is concerning the succession of an intestate, as bastards have no share in it, so they are not comprised under the name of children.[d]

V.

2795. *Children born in the Seventh or Eleventh Month.* — We must reckon in the number of children that are not legitimate, those who are born within so short a time after the marriage of their mother, that the husband has just reason to say that he is not their father;[e] and likewise those who are born so long a time after the death of the husband, that it is reasonable to judge that they have been conceived only after his death.[f]

Remarks on the Preceding Article.

2796. We have not set down in this article the precise time mentioned in the texts here quoted, because the shortest time which is marked for a forward birth, and the longest time for a backward birth, may be joined with such circumstances as to

[b] *L.* 104, *D. de verb. signif.*
[c] *L.* 56, *D. de verb. signif.*
[d] See the eighth article of the second section of *Heirs and Executors* in general.
[e] *L.* 3, § *ult. D. de suis et legit. hæred.*; — *l.* 12, *D. de statu hom.*
[f] *L.* 3, § *penult. D. de suis et legit. hæred.*; — *v. Nov.* 39, *c.* 2.

make us doubt of the certainty of the rule concerning the time necessary for a lawful birth. Neither does there appear any natural principles by which it may be demonstrated that a child, in order to its being born at the due time, must needs have been conceived a hundred fourscore and two days before its birth, and that a child born within a shorter time after the marriage cannot be legitimate. Neither do we know of any natural principles which demonstrate that a birth cannot be delayed beyond the tenth month. For as to the forward birth, although we had the experience of children certainly conceived at a certain day, born afterwards on the hundredth fourscore and second day, and which had lived a long time, and other proofs of children born one or two days sooner, which were not able to live; yet we could not infer from thence that the space of a hundred fourscore and two days is so precisely necessary, that it is absolutely impossible for a child to live, if it wants one day of the said time. And if it should happen, that a child which had been certainly conceived about five months only before its birth should nevertheless live several years, which very credible persons affirm that they have seen, this event would not be looked upon as an effect impossible to nature, but as being natural, although very singular. And as to the birth in the eleventh month after the husband's death, it is known that there are examples, both ancient and modern, of children who have been adjudged to be legitimate, although born a long time after ten months from the death of their father. So that it does not seem possible to regulate the just time of a woman's going with child, in order to determine that a child is illegitimate, if it is born a few days sooner, or a few days later. And it is not reasonable that a question of this importance should depend on a rule which undertakes to fix the time of the operations of nature, and especially of those which the combination of different causes does diversify, and where it does not seem possible to point out the precise bounds of what nature is able, or not able, to do. But it seems reasonable that, in the particular cases where the question is whether a child be legitimate or not, the doubt arising from this, that the child's birth is either too forward or too backward, we should join to the common rules which result from the texts quoted on this article, as to what concerns the time of a woman's going with child, the consideration of the particular circumstances, in order to decide wisely and prudently a question of so great consequence, in which the honor of a mother, the state of a child,

and the quiet of the families, which have an interest both in the one and the other, are all equally concerned.*

VI.

2797. *Of Posthumous Children.* — The children who are not as yet born when their fathers die, whom we call posthumous children, and likewise those who are taken out of their mother's womb, she being dead before she was brought to bed, are reckoned in the number of children who succeed. And although they are not as yet born, when the successions which they are to inherit fall to them, by the death of their father, mother, or others their relations; yet they belong to them upon condition that they shall be born alive, and they are considered as heirs already before their birth.[g]

VII.

2798. *Of Stillborn Children.* — Stillborn children are not counted in the number of children who succeed. And although they were alive in their mother's womb at the time that the successions which concerned them fell, yet they have no share in them. For they are considered in the same manner as if they never had been born.[h]

VIII.

2799. *Of Monsters.* — We ought likewise much less to place in the number of children those lumps of flesh, or monsters, which are born without human shape.[i]

IX.

2800. *The Child born during the Marriage is presumed to be the Child of the Husband.* — The child which is born of a married woman is presumed to be the husband's: and it is held for legitimate, unless the contrary is proved.[l]

* See the fifth article of the second section of *Heirs and Executors* in general, and the remark which is there made on it.

[g] *L.* 1, *D. de ventre in poss. mitt.* Although these posthumous children are not as yet born when the succession falls to them, yet it belongs to them, and it is kept for them till their birth. See the seventh article of the following section, and the fourteenth article of the first section of *Curators.*

[h] See the fourth article of the second section of *Heirs and Executors* in general, and the fourth and fifth articles of the first section of *Persons.*

[i] See the fourth article of the second section of *Heirs and Executors* in general, and the fourteenth article of the first section of *Persons.*

[l] Pater is est quem nuptiæ demonstrant. *L.* 5, *D. de in jus vocand.*

SECTION II.

THE ORDER OF THE SUCCESSION OF CHILDREN AND DESCENDANTS.

2801. It is not necessary to give an account here of the several dispositions of the Roman law touching the succession of children, in the number of whom they reckoned those who had this name given them by adoption, nor of the differences which they made between the children that were emancipated, and those who remained under the father's power and authority; between the grandchildren by sons, and those by daughters; between the relation by the male sex, which they called *agnation*, and the relation by the female sex, which they called *cognation*. These differences, as to what concerns successions, had given occasion for several rules; so that, by the ancient law, the children who were emancipated were excluded by their brothers who remained in the family under their father's power; the children of daughters were excluded from the inheritance of their grandfather by the mother's side, by the sons and their children, and even by the collateral relations, who were of the number of the *agnates*. But in progress of time these differences were very much moderated;[a] and at last the Emperor Justinian quite abolished these distinctions, and called indifferently to the successions the children who were emancipated, as well as those who remained under their father's power, and without making any difference of sex or parentage by *agnation* or *cognation*.[b]

ART. I.

2802. *All the Children succeed by Equal Portions.* — If the person who dies, whether it be man or woman, leaves children behind, they shall succeed to the deceased by equal portions, without distinction of sex, and without any difference between those who are emancipated and those who have remained under their father's power; and if there is only one child, son or daughter, such child shall have the whole.[a]

[a] *V. l.* 1, §§ 2 *et* 4, *D. de suis et legit.*; — *l.* 9, *C. eod.*; — *l.* 12, *eod.*; — *l.* 14, *C. de legit. hæred*; — *tit. Inst. de hæred. quæ ab int.*, § 14, *et seq.*, *et tit. de senat. Tertul. et de senat. Orphit.*

[b] *Nov.* 118, *c.* 1, *c.* 4.

[a] *L.* 1, § 5, *D. si tab. test. nul. ext. unde lib.*; — *Nov.* 118, *c.* 1. The cases in which there

II.

2803. *The Children of the Children succeed by Representation with the Children of the First Degree.* — If, besides the children of the first degree, there should happen to be children of other sons or daughters deceased, those children of the second degree, or their descendants, whether sons or daughters, in whatever degree they chance to be, would be called to the succession together with the children of the first degree, to take the share in the inheritance which the person of whom they are descended would have had if he were alive; for they represent the said person, that is, take his place and enter into his right. Which is the reason that the succession is divided among the children of the first degree, and the descendants of other children deceased, not by the head, or in equal portions, according to the number of the persons who succeed, but by the stocks; the descendants of each son or daughter having no more among them all than the portion which their father or mother would take if alive.[b]

III.

2804. *As also among themselves, although there be no Children of the First Degree.* — If, all the children of the first degree being deceased, there should remain only grandchildren by sons or daughters, these grandchildren would succeed by representation of their father or mother. And although they should be all in a like degree, yet all the children of each son or each daughter, let them be of never so great a number, would have no more among them all than the portion which their father or mother would have had.[c]

is a right of primogeniture are to be excepted out of this article; and we must likewise except out of it the married daughters who have renounced their right of inheritance in favor of the male issue, or who without renouncing are excluded by some customs. See the preamble of the second section of *Heirs and Executors* in general. This exclusion of the daughters ceases when there are no males, nor any descended of males.

[b] *Nov.* 118, c. 1. This right of representation takes place in the direct line of descendants without limitation. But it has not place in the line of ascendants. See the fifth and sixth articles of the first section of the following title. And as to the representation among collaterals, see the third, fourth, sixth, seventh, and eighth articles of the second section of the third title.

It may be observed in relation to this right of representation which descendants have, that as it is agreeable to natural equity, so it is received in the provinces of France which are governed by their customs, as well as those which are governed by the written law. However, there are some strange customs, where the descendants have not the right of representation. So that the children exclude from the succession of their father the children of their own brothers, the deceased's grandchildren.

[c] *L.* 2, *C. de suis et legit.*; — *Nov.* 118, *c.* 1.

IV.

2805. *How the Children of Different Marriages succeed.* — If there are children or descendants of different marriages, whether it be by the father or mother's side, all the children of the same father, and all those of the same mother, succeed to them by equal shares, without distinction of the first or second marriage.[d]

V.

2806. *The Children of Different Marriages take the Rights of their Fathers and Mothers.* — In the case of the foregoing article, where children succeed to their father who has been more than once married, the children of the first marriage take out of his estate before the partition that which they ought to have in right of their mother; and those of the second or other subsequent marriage, if the father has had more than two wives, take likewise out of his estate before the partition what belongs to them in right of their mother. And if it is the succession of a mother who has had children of different marriages, those of each marriage take out of it before the partition that which they ought to have in right of their father.[e]

VI.

2807. *Portion of the Child which is not as yet born.* — If, in the case of the succession of a father who leaves behind him one or more children, his widow should happen to be big with child, the child in the mother's womb would be reckoned among the children of the deceased. And if the other children should proceed to a partition of the estate, it would be necessary to lay aside one share for the child that is to be born, and to name a curator to it, who may take care of its interest, unless they should think it more convenient to delay the partition until the birth of the child, either by reason of the uncertainty whether the child will be born alive or not, or because it may happen that there may be more children than one of this birth.[f]

REMARKS ON THE PRECEDING ARTICLE.

2808. The case mentioned in the text cited, of the birth of three children at a time, is so very rare, that it would be unreasonable to

[d] *L. 4, D. ad senat. Tertull. et Orphit.; — Nov. 22, c. 29.*

[e] *L. 4, C. de secund. nupt.; — Nov. 22, c. 29.* See the fourth title of the third book.

[f] *Ll. 3 et 4, D. si pars hæred. pet.; — v. l. 28, in fin. D. de judic.; — l. 36, D. de solut.*

leave always three shares for the children which may be born of a widow who is left big with child. And although it happens sometimes that there are two children at a birth, yet this would not be a sufficient reason for laying aside always two shares, when an inheritance is to be divided during the time that a widow is with child; for it would give too frequent occasion to make a new partition. And the inconvenience is much less in making a new partition when there happen two children at a birth, than in making it every time that there is only one. But it is more convenient and more natural for the children concerned in the partition to defer it till the widow of the deceased is brought to bed, that they may see whether there is any live child born or not, whether there are two, or only one. And if there should be only daughters alive, in a case where the eldest son was to have something by way of distinction over and above his equal share with the rest, it would be necessary likewise to defer the partition upon this account, that they might know whether it is a son or a daughter that is born. It is upon these considerations that we have not followed the rule explained in this text, and that we have made it conformable to equity and to our usage.

VII.

2809. *Curator to the Child that is in the Mother's Womb.* — In the case of a widow's being big with child, if it is necessary to do any thing for the security of the rights of the child that is to be born, whether it be in the case of a partition, if it is necessary that one should be made, or for other causes, such as that of exercising the rights and managing the goods which may belong to him, a curator is named for these functions, as has been said in its proper place.[s]

VIII.

2810. *Provision for the Widow Big with Child.* — If, in the case of the foregoing article, the widow should demand a provision out of the goods of the inheritance for her subsistence and maintenance during her being with child, on the child's account, this would be granted her in proportion to the quality of the persons, and the goods of the deceased, although she should have an estate of her

[s] *L.* 1, § 17, *D. de vent. in poss. mitt. et cur. ei.* See the fourteenth article of the first section of *Curators.*

own. For this provision being for a child that is to be born, and which is to have its share in the inheritance, both the public interest, humanity, and religion do all of them require that even more care should be taken for it than for the children that are already born. And this provision would be taken out of the ready money belonging to the inheritance, if there is any, or out of the other effects which may be most easily and most readily converted into money.[h] But if it should appear that the widow, in order to get this provision, had feigned herself to be big with child, she would be obliged to restore to the heirs whatever she had received upon that account.[i]

IX.

2811. *Provision for the Child whose State is called in Question.* — If in the same case there should be other children of a former marriage, or heirs of blood in default of children, who should pretend that the child which the widow is big with, or which is already born, is not legitimate, so that it should be necessary to have a judicial determination touching the state of this child that is born or to be born;[1] during the time that this question remains undecided, the child's mother or its curator might demand a provision out of the goods of the succession for its alimony. And if the lawsuit should last a long time, the allowance would be increased according to the expense, including likewise therein that which is laid out on his studies, and other necessary expenses, according to the quality of the persons and the greatness of the estate. For in such a controversy we ought to presume during the time that it is

[h] *L.* 1, §§ 19 *et* 20, *D. de vent. in poss. mitt. et curat. ejus*;—*l.* 5, *eod.*;—*l.* 1, § 15, *eod.*

[i] *L.* 1, § *ult. D. de ventre in poss. mitt.*

[1] Si cui controversia fiet an inter liberos sit, et impubes sit causa cognita perinde possessio datur, ac si nulla de ea re controversia esset. *L.* 1, *D. de Carbon. edicto.*

We have left out the remaining part of this law, which directs that the judgment touching the state of this child should be deferred until it has attained the age of puberty, unless, as it is said in the third law, § 5, of the same title, it should appear to be for the child's advantage not to have the judgment delayed; as if there should be danger of losing the proofs which might be of service to him. But if the other children, or the heirs who should controvert the state of this child, should refuse to agree to such a delay, and to leave the child in possession in the mean while, the usage in France would not approve of such delay. And it would be just, for the common interest both of this child and of its adversaries, to have the question touching the state of the child decided with its tutor or curator. And if the cause should be determined against him, the judgment which should be given would be only as it were provisional, and would not hinder him from applying afterwards to have it reversed, as well as every minor who has not been sufficiently defended.

undecided, both in favor of the mother that she hath not been unfaithful to her husband, and in favor of the child that it is legitimate; and it would be of a much worse consequence to have deprived the child of its nourishment and education, if it should appear to be legitimate, than to have diminished the inheritance in so much as had been applied to that use, although it should be afterwards adjudged that the child is not legitimate.[m] Thus, this allowance is not refused, although the state of the child may appear doubtful, which it ought to be if it were evident that the child had no manner of right.[n]

X.

2812. *The Descendants exclude the Ascendants from Successions.* — If the deceased has left behind him children, or only grandchildren, and if his father or mother or other ascendants have survived him, his children or grandchildren, of both sexes, in what degree soever they are, will exclude his father and mother, and they will likewise exclude from the succession all other ascendants, and much more all collaterals. For it is the natural order, that estates should go from fathers to their children.[o]

XI.

2813. *Of the Case where the Father and Son die at the same Time.* — Seeing the son does not succeed to his father but when he survives him, and since it may happen that they may both die together, so that it cannot be known which of them died first, it is necessary in this case to regulate who shall succeed to the estate both of the one and the other. Thus, for instance, if it should happen that a father and his son had perished together in a battle or in a shipwreck, and it were impossible to know which of them had survived and succeeded, whether the son had survived the father or the father the son, that the estate of him who died first might go to the heirs of the other, it would be presumed that the son had survived and succeeded to the father. And it would be the same thing if it were the mother and the son. For this being the natural order, it is supposed that the event has been conformable to it; and this presumption may be founded on this, that it is natural to

[m] *L.* 5, § 3, *D. de Carbon. ed.*; — *l.* 6, § 5, *eod.*

[n] *L.* 3, § 4, *eod.* Although this last text does not relate to the provision for alimony, but to the inheritance itself, yet it may be applied to the one as well as to the other.

[o] *L.* 11, *C. de suis et legit. lib.*; — *Nov.* 118, *c.* 1.

think that, by reason of the difference of age, the son, being the more robust, has resisted death the longest.[p]

XII.

2814. *Of the Case where the Mother and the Child on the Breast die together.* — Although in the case of the preceding article it is presumed that the father died first, yet if for another case we should suppose that it were a sucking child who died with its mother, whether it were in a shipwreck, by fire, or some other accident, it would be presumed, because of the weakness of the child, that the mother had lived longest. And the same thing would be presumed in every child that has not as yet attained the age of puberty, whether it be that the case had happened to the son and the mother or to the son and the father.[q]

Remarks on the Two Preceding Articles.

2815. It is necessary to remark on this and the foregoing article, that, these rules appearing to be founded on the presumptions of what naturally happens, it would seem that they ought to be fixed, and always the same in all sorts of cases without distinction. That is to say, that whatever the consequence might be, either for or against those who have any interest whether the father or son died first, and without any regard to the consideration which the interest of one of the parties might deserve above that of the other, we ought always to judge in the same manner. Nevertheless, we see in some laws that, in these sorts of cases where it is not known which of the two died first, the presumptions are different, according to the consideration of the persons concerned. Thus, for example, in the case mentioned in the first of the texts cited on the preceding article, where the question was, whether the relations of the father ought to inherit his estate, which would have been just if he had survived his son, or whether the mother ought to inherit the father's estate, as having passed to the son if he died only after his father, the Emperor Adrian decided in favor of the mother, that the son had survived his father. Thus, on the contrary, in a like case, where a person who had been set free from slavery died together with his son by

[p] *L.* 9, § 1, *D. de reb. dub.*; — *l.* 22, *eod.*; — *d. l.* § 4. See the following article, with the remarks upon it. See likewise the fifteenth article of the fourth section of *Proofs and Presumptions*, and the remark upon it.

[q] *L.* 26, *D. de pact. dotal.*; — *l.* 23, *D. de reb. dub.*; — *l.* 9, *in f. eod.*

the same accident, so that it was uncertain if either of them or which of them did survive, another law presumes in favor of the patron; that is, of the master who had given this person who had been a slave his freedom, that the son had not survived his father, that the father's inheritance might go to the patron;[a] for he had right to succeed to the person whom he had made free from slavery, and who died without children. And this law prefers him to the person who ought to be heir to the son, unless it were clearly proved that the father died first: *Si cum filio suo libertus simul perierit, intestati patrono legitima defertur hæreditas; si non probatur supervixisse patri filius.* These are the words of this law, which explains afterwards the motives of this decision, founded on the consideration of the person of the patron. *Hoc enim reverentia patronatus suggerente dicimus.*

2816. We see also, that, in a like event of a father and a son having perished together in a shipwreck, or by some other accident, another law presumes, under another view, that the son did not survive the father. It is in the case where a testator had required his heir to restore his estate, or a part of it, or some particular thing, to another person after the death of this heir, if he should die without children. It is said in that law, that if the person who was charged with this fiduciary bequest[b] having only one son, this son and his father had died at the same time by some accident, so that it was impossible to know which of them had survived, it would be presumed that the son had not survived, and that therefore the case of the fiduciary bequest had happened, the person who was charged with it having died without children, which would make the estate to go to the person for whose benefit the fiduciary bequest was devised; whereas, had it been presumed that the son had survived, it would have made the case of the fiduciary bequest to cease; and the son having succeeded to his father, he would have transmitted the estate to his heir. *Si quis susceperit quidem filium, verum vivus amiserit, videbitur sine liberis decessisse. Sed si naufragio, vel ruina, vel aggressu, vel quo alio modo simul cum patre perierit (filius) an conditio, si sine liberis pater decederet, defecerit videamus, et magis non defuisse arbitror. Quia non est verum filium ejus supervixisse. Aut igitur filius supervixit patri, et extinxit conditionem fideicommissi: aut non supervixit, et extitit con-*

[a] *L.* 9, § 2, *D. de reb. dub.*

[b] This is the name which is given to these sorts of dispositions, which we shall treat of in the fifth book.

ditio. Cum autem quis ante et quis postea decesserit non apparet, extitisse conditionem fideicommissi magis dicendum est. L. 17, § 7, *D. ad senat. Trebell.* It would seem as if we might reasonably conclude from this decision, that, since it presumes contrary to the natural order, and against the rule explained in the eleventh article, that the son did not survive the father, it is founded only on the favor of the fiduciary bequest, to make it subsist against the heir of the son. And since it was sufficient for the person who was to be benefited by the fiduciary bequest, that the son had not survived, whether he died before his father, or only in the same moment with him;[c] the law barely supposes that the son did not survive, and that therefore the condition of the fiduciary bequest was come to pass, which accomplishes the intention of the testator, which was to prefer nobody to the person who was to be benefited by the fiduciary bequest, but the children of his heir, in case he should have any who should succeed him.

2817. It appears from all these several questions which arise from the case where the father and son die together, that the laws decide differently touching the order of their death, according to the differences of the persons concerned, judging in favor of the mother, that the father died first; deciding, on the contrary, in favor of the patron, that the son did not survive; and in favor of the fiduciary bequest, that the condition on which it was left has happened by the father dying without leaving any children alive behind him. And in this last case, it is not the favor of the person for whose benefit the fiduciary bequest is left that occasions this decision, but barely the quality of its being a cause relating to a fiduciary bequest, which was singularly favored in the Roman law. But if, in the same case of this fiduciary bequest, it were the widow of the father and mother of the son who died together, who should pretend that, according to the rule of the eleventh article, and the order of nature, her son had outlived his father, and that therefore the condition of the fiduciary bequest had not happened, since, the father having died the first, he did not die without children, would it be presumed against the mother in favor of him who was to have the benefit of the fiduciary bequest, that the son had survived his father; and would it not be just, on the contrary, to presume in favor of the mother, that the son had lived longest, seeing the mother would have for her, on one side, the natural pre-

[c] *D. l.* 17, § 7.

sumption that the son ought to survive the father, and, on the other side, the favor of her quality of mother, which, according to the spirit of the laws which we have just now quoted, would seem to decide in her favor? The consequence seems to be very well grounded, and, in order to judge the better of it, it may be remarked that there result from the laws which we have quoted, and from others relating to this subject, three different manners of decision in cases of this nature. The first, which supposes that according to the order of nature the son has survived the father; the second, which makes an exception to this first in the case of a child who is under the years of puberty; and the third, which supposes that the father and son died in one and the same moment. And it is very certain that one of these cases must of necessity happen; that is to say, either that the father dies first, or that he dies last, or that both the one and the other die at the same moment. It may be said of the third of these three kinds of presumption, that it ought to be abolished, if it were the rule to presume always that the son who is adult survived the father, and that the father survived the son that was under the age of fourteen years. For by this rule we ought never to presume that both of them died in the same instant; and all the questions would be decided by the age of the son. Since, therefore, it is certain that the laws presume sometimes that the son, even although he be of the age of fourteen years, has not survived, it follows from thence that those laws suppose that it may naturally happen, either that the son dies first, or that both the one and the other die in the same instant; and this is likewise a truth which reason sufficiently convinces us of. For it may happen several ways, that the mother may perish under the ruins of a building sooner than the child whom she suckles. It may happen that a son may be killed in a battle before his father; and on the same occasions, and likewise on all others, it may so fall out, that they both die in the same instant, or that even he who by reason of his age, or some other infirmity, might be presumed to die first, does nevertheless die the last. It is upon this natural diversity of events that the different manners in which the laws decide questions of this nature are founded, presuming sometimes that the death of both has happened in the same instant, as it may fall out, and at other times that one of the two died first, not by the presumption of the equality or difference of their ages, or of other causes, but by presuming that that has happened which may be most advantageous to the

party whose cause is most to be favored. For whereas if we knew certainly the truth of the event, whatever it were, it would be necessary to decide conformably thereto; the uncertainty of what has happened, when we can have no proofs of it, makes the law to determine with authority that that has happened which the natural bias seems to demand, as appears by the examples which we have just now explained. And this manner of deciding may have its foundation in a principle of equity which is very natural; for, seeing it is impossible on one side to know the truth, and necessary on the other side to come to some decision, which cannot be made but by supposing one of the cases which may happen, there is only the law which can substitute its authority, in the place of the decision which the truth would make, if it were known. It is in this manner that we ought to reconcile those decisions which are so different; whence it seems to follow, that, in the questions of this nature, we ought to join to the knowledge of the matter of fact, such as it may be gathered from the circumstances, the consideration of the persons concerned, that we may decide the matter by all these views pursuant to the principles which result from the reflections on all the said laws.

2818. If, in order to make application of these principles, we suppose that, a father and his only son of about thirteen years of age having died together, the widow, mother of the said son, demands the goods of the father, together with those of the son, pretending that the son outlived the father, and consequently succeeded to him; and that the collateral relations of the father demand his inheritance, and likewise over and above that which the father was entitled to out of the goods of the son; and ground their pretension on this, that, the son not having as yet fourteen years of age, we ought to presume that the father outlived him; how ought this question to be decided? Would it be adjudged that the son, because of his tender age, died the first, and that therefore the mother is to have no share in the goods of her son? Or will it be presumed, in favor of the mother, that the son has survived the father? And even although it were a child of much younger years, would the mother be deprived of that which she ought to have, if it were certain that her son had survived, since it may even have happened that the father died before the son, by reason of other circumstances besides that of age, which is not a certain proof that the son died first? Or would it be supposed rather that both the one and the other died in the same instant,

in order to give to the mother the estate of her son, whom the father did not survive, and to the collateral relations the father's estate, to which the son did not succeed, he not having survived the father? The first of these three ways of deciding this question would appear too hard. And since it is possible that the son may have survived, it would seem that we ought not to decide the doubt by the contrary supposition, which deprives the mother of all manner of share in the goods of her son which came to him by his father; which consideration will be an inducement for deciding the doubt according to the second manner; since the third would still have this hardship in it, that the mother would be thereby deprived of that which even the customs, which appropriate the goods to those of the stock from whence they came, give her out of the goods which the son has inherited of his father.

2819. If we suppose for another case, that a father who had several sons dies with one of them, so that it cannot be known which of them died first, and that this son, having some estate of his own, had made a testament, and therein named one of his friends his universal heir, and that, the brothers coming to divide among them their father's estate, this heir of their brother should pretend that the son had survived the father, and that therefore he ought to have, not only the goods belonging to this son, but likewise the share which fell to him of his father's estate; would this question be decided in favor of this heir, by presuming that the son died last, or would it be determined in favor of the brothers, upon the presumption that they died both in the same instant, and that so the brother's heir has no share in the goods of the father, and that he ought to take only the goods which their brother may have had some other way? This heir would be founded on the presumption that the son had survived and succeeded his father: and the brothers would have to urge on their side, not only the consideration which is so much favored of the natural equity which calls them to succeed to their father's estate, and which excludes this stranger from it; but likewise this reason, that, there being no manner of proof to show which of the two died first, nor any reason to presume in favor of the stranger, against the interest of the brothers, it ought to be presumed that both the one and the other died in the same instant, with as much or rather more reason than in the case of the fiduciary bequest which has been spoken of. So that, according to the principles which we have just now been inquiring into, it would be enough for this heir that he

should have the proper goods of the son, without having any share in those which the son would have inherited of his father, if it had been certain, as it is not, that he did survive him.

2820. We might give other examples of the like cases, but these few are sufficient for a matter which so rarely happens; and it is enough to have taken notice of these several principles, which seem to be sufficient for all the different cases of this nature.[d]

XIII.

2821. *Children have the Right of Transmission.* — Children and other descendants are considered as being in some manner masters of the estate of their father or mother, grandfather or grandmother, and other ascendants, even before their death. And when that does happen, it is not so much a succession which the children acquire, as a continuation of a right which they had already, with this difference between this right and the inheritance, that whereas, during the life of the ascendant to whom they succeed, they had his estate as it were in partnership with him, and that his possession preserved it to them, they have now all alone the sole and entire right to the estate after his death. Thus, although they should know nothing of his death, and even although they should be ignorant of their own right, as if they should happen to be young children, yet the estate would be entirely theirs.[r] Which has this effect, that if the son who has survived his father, and who has not renounced the succession, happens to die before he has entered to it, or even before he knows that it is fallen to him, he would transmit, that is to say, would make his right to

[d] *V. l.* 32, § 1, *D. de religios. et sumpt. fun.*; — *l.* 9, § 1, *D. de reb. dub.*; — *d. l.* § *ult.*; — *l.* 16, *eod.*; — *d. l.* 16, § 1; — *ll.* 17 *et* 18, *eod.*; — *d. l.* 18, § 1. It appears by these texts, the words whereof we have not set down here, that the ordinary presumption is that the two died in the same instant, since it cannot be said of any of them that he survived the other. So that it is only by circumstances, or upon particular considerations, that the contrary is presumed.

See the fifteenth article of the fourth section of *Proofs and Presumptions*, the seventh article of the second section of *Pupillary Substitution*, and the eighteenth article of the first section of *Substitutions*, direct and fiduciary.

[r] *L.* 14, *D. de suis et legit. hæred.*; — *l.* 11, *D. de lib. et post.*; — § 3, *Inst. de hæred. quæ ab int.* Although these words *suus hæres* do not agree to all children in the Roman law, and children emancipated from their father's power lost this quality, yet these texts are nevertheless conformable to the usage in France, which does not make this distinction between children in matters of succession, and which, even under the Roman law itself, was abolished by Justinian. *V. Nov.* 118, *c.* 1.

pass to his heirs. And this is what is called the right of transmission, of which we shall speak in its proper place.[s]

XIV.

2822. *Provision for the Children who deliberate whether they shall accept the Inheritance.* — Although children and other descendants, who survive their fathers and mothers, and others their ascendants, are seized of their estate, as has been said in the preceding article, yet they have nevertheless the liberty to deliberate whether they will accept the inheritance, or whether they will abstain from it. And if, during the time that is given them for deliberating, they demand some allowance for their substance, it is granted unto them, as has been said in another place.[t]

XV.

2823. *Fathers have the Usufruct of Successions which fall to their Children.* — It is necessary to remark in relation to the successions of ascendants which go to their children, and other descendants, that they have not always a full and plenary right to them. For if the son who is under his father's authority succeeds to his mother, or other ascendant by the mother's side, his father shall have the usufruct of the goods of that succession, as shall be explained in the following title.[u]

XVI.

2824. *Rights which pass to those of the Family who do not succeed to the Estate.* — We must likewise observe upon the some subject of the succession of children and other descendants, and likewise in general touching all successions of intestates, whether they be descendants, ascendants, or collaterals, that there may be in the inheritance certain rights which go to the heirs of blood, although they be deprived of the succession by a testament, or even that they renounce it. Thus, the right of patronage annexed to a family passes to those to whom the title gives it, although they do not succeed to the estate.[x] Thus, the right of being interred in

[s] See the tenth section of *Testaments*.

[t] See the sixth article of the first section of *Heirs or Executors with the Benefit of an Inventory*.

[u] See the second section of the following title.

[x] *L.* 9, *D. de jur. patron.*; — *l.* 47, § 4, *D. de bon. libert.* Although the right of patronage which is spoken of in this article be of a different nature from that mentioned in this law, yet it may be applied to it, seeing these two rights have one and the same name, and

the burying-place of the family passes equally to those who are of the family, whether they inherit the estate or not.[y]

SECTION III.

OF THE LINES AND DEGREES OF PROXIMITY.

2825. ALTHOUGH the subject-matter of this title be limited to that which concerns children and other descendants, and it may seem for that reason that we ought to speak here only of the lines and degrees of descendants; yet the connection there is between the lines and degrees of ascendants, descendants, and collaterals does not allow this matter to be divided; but seeing we are about to explain here the lines and degrees of descendants, it is proper likewise to join the others.

2826. Seeing these lines and degrees of proximity, or consanguinity, are more easily distinguished in a figure, we have inserted one at the end of this section. But it is necessary beforehand to explain what is meant by degrees of proximity, and by the lines which the said degrees compose; for it is by those lines and degrees that we see what is the proximity between two persons; and this shall be the subject-matter of this section.

2827. The knowledge of the degrees of proximity is not only necessary in the matter of successions, but likewise in other matters; as in tutorships, that those may be named tutors who are related to the minors, and those excused who are not: in the challenges or recusations of judges who are relations: in the admission of witnesses, either in civil or criminal causes, in order to receive or reject the testimony of those who are related to the parties:[a] in marriages, which are unlawful between those that are within certain degrees of relationship or affinity.[b]

2828. The prohibitions of marriages within the degrees of proximity and affinity, which had been established by the Roman law,

that the one as well as the other goes to the nearest relations, although they do not succeed as heirs to the estate. The patronage spoken of in this article is the right which the church has granted to the founders of some benefices, and their descendants, to present to the ordinary, who has the right of institution, persons who are capable. Which is a matter that does not come properly within the design of this book.

[y] *V. l.* 6, *D. de relig. et sumpt. fun.*

[a] *L.* 10, *D. de gradibus et affin.*

[b] *L.* 17, *C. de nuptiis.*

have been very much enlarged by the canon law, which is observed in France.[c] But this matter does not belong to this place; for here it sufficeth to point out the order of the degrees of kindred in so far as concerns successions. And as for the degrees of affinity or alliance, as the same have no relation to successions, allies by marriage having no manner of right to inherit, we shall say nothing of them.[d] The degrees of affinity are sufficiently distinguished by those of proximity; for in order to know the degree of affinity between the husband and the relations of his wife, and between the wife and the relations of her husband, there is no more required but to place the husbands in the same degree in which their wives are, and the wives in the same degree with their husbands.

2829. Seeing all the articles of this section have relation to the figure of kindred which is placed at the end of it, and that without the sight of the said figure it will be difficult for beginners to understand aright all this detail; they are to take notice that it will be convenient for them to have the figure before them at the reading of each article, and before they look into it to read the advertisement which we have set down at the end of this section, for the right understanding the use of the said figure.

ART. I.

2830. *What are the Degrees of Proximity or Consanguinity.* — Seeing proximity between two persons proceeds either from this, that they are descended one from the other, which makes the connection between ascendants and descendants, or from their being both descended of one and the same person, which makes that of collaterals; we judge, therefore, of the proximity between two persons by the number of generations which make both the one and the other of the said connections. And these generations are called degrees, by which we step from one person to another in order to make the computation of their kindred,[a] in the manner which shall be explained in the following articles.

II.

2831. *What are the Lines of Consanguinity.* — By lines of consanguinity is meant the succession of degrees or generations which

[c] *V.* 35, *q.* 4.

[a] *L.* 10, § 10, *D. de grad. et affin.*

[d] *L.* 7, *C. com. de success.*

are between one person and another. And as there are three orders of proximity, that of ascendants, that of descendants, and that of collaterals, so there are likewise three orders of lines.[b]

III.

2832. *Line of Ascendants.* — In the order of ascendants of the person whose relation we want to know, we place above him his father, his grandfather, his great-grandfather, and his other ancestors, each of them in their rank according to their degrees, and the first degree is that which ascends from the son to the father, the second from the father to the grandfather, the third from the grandfather to the great-grandfather, and so on successively with the others, according to the same order. Thus, the father is in the first degree to his son, and the grandfather in the second degree to the grandson, and so on with the rest. It is these degrees whereof the situation one above the other makes the line of ascendants, which, being joined with that of the descendants, of which we shall speak in the following article, makes together only one line.[c]

IV.

2833. *Line of Descendants.* — In the order of descendants of the person whose relation is in dispute, we place under him his son, his grandson, and the other descendants, every one in his rank according to their degrees, the first of which is that which descends from the father to the son, the second from the son to the grandson, the third from the grandson to the great-grandson, and the others in the like manner, according to the same order. Thus, the son is in the first degree to the father, and the grandson in the second degree to the grandfather, and so on with the rest.[d] It is these degrees whereof the situation of one under the other makes the line of the descendants, which, as has been said in the preceding article, makes only one line with that of the ascendants.

V.

2834. *Line of Collaterals.* — In the order of collaterals there is this difference that distinguishes it from the orders of ascendants and descendants, that whereas there is only one line of ascendants

[b] *L.* 1, *D. de gradib. et affin.*
[c] *L.* 1, § 3, *D. de grad. et affin.*; — *d. l.* § 4; — *d. l.* § 5.
[d] *L.* 1, § 3, *D. de gradib. et affin.*; — *d. l.* § 4; — *d. l.* § 5.

and descendants, there are as many lines of collaterals as there are places of ascendants and descendants, including therein the place of the person whose kindred we inquire into. For at his side are his brothers, at his father's side are his uncles, at his son's side are his nephews, and so on with the others in several lines both ascending and descending, as shall be explained in the tenth and following articles, and as appears plainly enough by the figure. These are the lines which are called collateral, because they are at the side of the direct line of ascendants and descendants. So that, in order to reckon the degrees of kindred between two collateral relations, it is necessary to find in the direct line the first of the descendants that is common to them, that is, the first of whom both the one and the other are descended, and then to count the degrees which ascend from one of them to that common parent or ascendant, and those which from that ascendant descend to the other. Thus, between two brothers there are two degrees; the first, which ascends from one of the brothers to their father; and the second, which descends from the father to the other brother. Thus, there are four degrees from one cousin-german to another, two which ascend from one of them to his father and grandfather, and two which descend from the said grandfather to the other cousin. And it was in this manner that proximity was reckoned among those persons in the Roman law, placing the brothers in the second degree, and the cousins-german in the fourth. But by the canon law, which is observed in France, as has been said in the preamble of this section, the same degrees are considered under another view, and the computation is made in another manner, by placing brothers in the first degree, and cousins-german in the second. For they are compared among themselves according to their situation under the common parent or ascendant. Thus, the two brothers are in the first degree under their father, and the two cousins-german are in the second degree under their grandfather. We shall see in the tenth and following articles what relates to the other collaterals; but this difference between the canon and civil law is only in the collateral line, for as to the ascendants and descendants the degrees are the same in both laws.[e]

[e] *L.* 1, § 4, *D. de gradib. et affin.* Since, by the manner of counting the degrees according to the Roman law, the brothers are in the second degree, and are the first and nearest in the order of collaterals, it is therefore said that in that order there is no first degree. *D. l.* § 1; — *d. l.* 1, § 6; — *l.* 10, § 15, *eod.*

VI.

2835. *Divers Lines of Ascendants and Descendants.* — Although we reckon only one line of ascendants, and one of descendants, which between them make no more than one line, which ascends from the children to the fathers, and descends from the fathers to their children, and is called direct; yet each of these two orders of ascendants and descendants has under other views several lines, which are to be distinguished for divers uses. For whereas, for example, it is necessary to consider only one line of ascendants and descendants on the father's side, when the question is to compute the degrees from father to son between an ascendant and a descendant;[f] yet if we will distinguish the ascendants on the father's side and on the mother's side of one and the same person, and his descendants of sons and daughters, there are several lines, as shall be explained in the three following articles.

VII.

2836. *Lines of Ascendants by the Father's Side and Mother's Side.* — If we will reckon all those who are in the order of ascendants of any person, there is first a line which ascends from that person to his father, to his grandfather by the father's side, to his great-grandfather by the father's side, and to the other ascendants from father to father: and there is another line which ascends from the same person to his mother, to his grandmother by the mother's side, and so on to the others from mother to mother. But these lines not containing all the ascendants, there are several other lines to be imagined, in order to comprehend them all, as shall be explained in the article which follows.[g]

VIII.

2837. *Multiplication of Ascendants, and their Lines.* — To understand aright the order of those other lines of ascendants, besides the two which have been mentioned in the preceding article, it is necessary to consider, that the number of ascendants increases always the double at every degree. Thus, every one has in the first degree only his father and his mother, and in the second he has his grandfather and grandmother by the father's side, and likewise his grandfather and grandmother by the mother's side. So that whereas in the first degree there are only two persons, there

[f] This is a consequence of the first article.

[g] This is likewise a consequence of the first article.

are four in the second, and in the third there are eight, which are the father and mother of the grandfather by the father's side, the father and mother of the grandmother by the father's side, the father and mother of the grandfather by the mother's side, and the father and mother of the grandmother by the mother's side. And according to this order, in mounting always to the ascendants of each person, we shall go by several lines which branch out at each generation. And by this progression we shall find sixteen persons in the fourth degree, thirty-two in the fifth, sixty-four in the sixth, one hundred twenty-eight in the seventh,[h] and so on with the rest. Which would make above thirty millions of persons in the five-and-twentieth generation in ascending. So that by continuing we should find, in much fewer generations than what have been since the first man, many more ascendants of each person than there have been men since the creation. But as many of the ascendants of one person are descended from the same ancestors, the lines which were branched out join together again at the first common ascendant, from whom the others were descended. Thus, this multiplication, being often interrupted by these common ascendants, ceases and is reduced in such a manner, that we come at last to the only common ascendant from whom all mankind is descended.

IX.

2838. *Difference between the Lines of Ascendants, and those of Descendants.* — There is this difference between the lines of descendants and the lines of ascendants, that these are the same for all persons; for every one has the same order of ascendants that any other has, although the number of the ascendants of all persons is unequal, according as they have more or fewer common ascendants in the sense explained in the preceding article. But it is not the same thing with respect to the lines of descendants; for these lines branch out, and are divided differently according to the number of the children and descendants; and they end or are extended more or less, according as the generations cease or are continued. So that in many families all their descendants come to an end, and in many others their posterity will remain to the end of the world. Thus, the lines of the descendants of each family are diversified. But if we want only to see the degrees or generations between one single ascendant and one single descendant,

[h] *L.* 10, § 18, *D. de gradib. et affin.*; — *l.* 3, § *ult. eod.*

from father to son, there is no occasion to imagine more than one line, whatever number of degrees there may be between the two.[i]

X.

2839. *Divers Lines of Collaterals.* — As there are several lines of ascendants and descendants, in the sense explained in the preceding articles, although we reckon only one when we count the degrees from an ascendant to a descendant, or from a descendant to an ascendant; so we may also distinguish several lines of collaterals, according to the several degrees which they take up;[l] as shall be explained in the articles which follow.

XI.

2840. *Three Orders of Collaterals.* — In order to make the knowledge of these several lines of collaterals easier, and to avoid confusion therein, we may distinguish the said lines into three orders. The first contains only one line, which is that wherein are placed brothers, cousins-german, second-cousins, and the other cousins who are at the side of the person whose kindred we inquire into, and in such a manner that they are all of them in an equal distance with the said person from the ascendants that are common to them. The second order contains several lines which are above that of the brothers; and in the first of the said lines are the uncles, in the second the great-uncles, and so on with the others, ascending from line to line. And in each line at the side of the uncles and great-uncles, and of the others upwards, are the cousins, who are at a less distance than this person from their common ascendant. And the third order of these lines contains also several lines which are underneath that of the brothers; and in the first of the said lines are the nephews, in the second the sons of nephews, and so on with the others, descending from line to line. And in each of these lines at the side of the nephews and sons of nephews, and the others downwards, are the cousins, who are farther removed than this person from their common ascendant. Thus, all the collaterals are comprehended in the several lines of these three orders, under the names of brothers, uncles, nephews, and cousins of both sexes.[m]

[i] This is a consequence of the foregoing articles.

[l] See the following articles. To understand aright this and the following articles, it is necessary to have the figure before us.

[m] See the figure, and the 8th, 9th, and 10th articles of the first section of the third title.

XII.

2841. *The Proximity of the Degrees of Collaterals is not regulated by the Order of the Lines.* — This distinction of three orders of the lines of collaterals has not this effect, that all those of one line are either nearer or remoter from the person whose relations we inquire into than all those of another line; but, excepting the brothers, there are some in each line who are nearer to this person than some in all the other lines; and there are likewise in each line some who are more remote from the same person than some in all the other lines. Thus, the uncle who is in the first line of the second order, and the nephew who is in the first line of the third order, are nearer than the cousin-german, who is in the line of the first order. And it is easy to see by the figure, the different proximities of all the degrees in all the lines of these several orders.[n]

XIII.

2842. *Situation of the Lines of Collaterals.* — Of these three orders, the first, which begins with the brothers, has only, as has been said, one line, which crosses and divides that of the ascendants and descendants, in the point where the person whose kindred we inquire into is placed. But as to the other two orders, the one has as many lines as there are ascendants, and the other as many as there are descendants. And of all those lines which are parallel to those of the brothers, those of the second order are above, and every one of them crosses the place of one of the ascendants. And the lines of the third order are underneath, and each of them crosses the place of one of the descendants. Thus, we may observe this difference between the said three orders, that in the first, which has only one line, all those who are in it, and the person whose kindred we search into, are equally distant from the ascendants whom they have in common; that in the second, which is composed of the lines that cross the places of the ascendants, all those who are in it are nearer to the common ascendants than the person whose kindred is in question; and that in the third order, which is made up of the lines which cross the places of the descendants, all those who are in it are more remote than this person from the ascendants that are common to them.[o]

[n] See the figure.

[o] See the figure.

XIV.

2843. *Two Ways of counting the Degrees, one according to the Roman Law, and the other according to the Canon Law.* — According to these orders of collaterals, to count the degrees of kindred between two persons, as they were computed in the Roman law, we need only to follow the generations from one to the other, as has been said in the fifth article, mounting from one of the two to their common ascendant, and descending to the other. Thus, between one and his brother there are two degrees, as has been explained in the same article. Thus, between one and his uncle there are three degrees, two which ascend from this person to his grandfather, who is their first common ascendant, and a third which descends from the grandfather to the uncle. And by this computation the brothers, as has been said, are in the second degree to one another, and the uncle and nephew are in the third.[p] But according to the canon law, the two brothers are in the first degree, and the uncle and nephew in the second. For among collaterals the rule is, that those who are equally distant from their common parent or ascendant are in the same degree of distance from one another that each of them is from the common ascendant; and that those who are at unequal distances from their common ascendant are in the same degree to one another that the person who is most remote from that ascendant is to the said ascendant.[q] Which makes the computation of all the degrees of collaterals very easy.

Advertisement for the Use of the Figure.

Since there may be occasion to count the degrees of consanguinity according to the manner of the Roman law, or according to that of the canon law, the following figure serves both for the one and the other. For in each place the number of the degrees is differently marked for the two, the number at the top marking the degrees according to the canon law, and the number below according to the Roman law.

As for the lines, they are marked by the places of which they are composed. And it is easy to distinguish them all by the bare view of the figure, where they are such as we have just now explained them.

[p] *L.* 1, § 5, *D. de gradib. et affin.*

[q] See the figure.

TITLE II.

IN WHAT MANNER FATHERS, MOTHERS, AND OTHER ASCENDANTS, SUCCEED.

2844. The succession of parents to children is not according to the order of nature, as in the succession of children to parents. But when it does happen that parents outlive their children who die without children, it is but just that they should not suffer the double loss both of their children and also of the goods which they may leave behind them; and this sort of succession of ascendants, which in one sense is not natural, is in another respect conformable to the law of nature, which calls them to the succession as being the next of kin, and to equity, which gives them this comfort under their loss.

2845. It is perhaps because the succession of ascendants is not conformable to the order of nature, that it has been so differently regulated by divers laws among the Romans, both with respect to fathers and also with respect to mothers. As for fathers, seeing they had the property of every thing which their children who were not emancipated could acquire, excepting only the peculiar patrimonies of which we shall speak in the preamble of the second section of this title, the goods of the said children whom their fathers survived did not pass to any heir, but they remained to the fathers who had a right to the said peculiar patrimonies, if their children left no children behind them, and died without disposing of them. And as for the children who were emancipated, and who had acquired some estate, their fathers did not succeed to them by the ancient law, unless that when they did emancipate them they had taken the precaution to secure to themselves the right of succeeding to them, by observing a formality which had this effect, and without which they did not succeed to them.[a]

2846. As to the mothers, they had not in the beginning any share in the succession of their children, whether they were emancipated or not, and likewise the children did not succeed to their mother. In process of time mothers did succeed, but differently, according to the different times and the whimsical changes that many laws made in their right of succession, by the distinctions of

[a] *V. § ult. Inst. de legit. agn. success.*

the cases where the mothers succeeded in conjunction with the father alone, or with the father and brothers of their deceased children, or with the father and the brothers and sisters, or with the brothers and sisters without the father, or with the brothers without sisters, or with the sisters without brothers. Which made many different combinations, and as many rules which diversified the ways which fathers and mothers succeeded to the children.[b] But without entering into this detail, which would be of no manner of use, we shall confine ourselves to the latest laws, which have fixed all those changes, and which are in use in the provinces where the Roman law is received as their custom.

2847. Here we may observe the inconvenience of the succession of ascendants in making the goods to pass from one family to another; when a mother, for instance, succeeding to her son who had already inherited the succession of his father, transmits his paternal estate either to her children by a second husband, or to other persons. And it is the same thing with respect to the father and other ascendants who succeed to their children.

2848. It is against this inconvenience that provision has been made by that rule of the customs in France which directs that immovables which come by descent from their ancestors shall not remount. Which has been explained in another place.[c] And because the said rule did not extend to the provinces where the Roman law takes place as custom, it was there provided for by that ordinance which is called the edict of mothers,[d] which ordains that mothers shall succeed only to the movables, and other goods which their children may have acquired otherwise than by the father's side; and that they shall have only the usufruct of the half of the immovables which came to their children by descent from the father's side. But that edict is restrained to mothers, and does not make the least alteration with respect to fathers and other ascendants.

[b] *L.* 10, *D. de suis et legit.*; — *l.* 2, § 9, *D. ad senat. Tertull. et Orphit.*; — *d. l.* § 18; — *tit. Inst. de senat. Tertull. et tit. de senat. Orphit.*; — *l.* 2, *C. ad senat. Tert.*; — *l.* 4, *eod.*; — *l.* 7, *eod.*; — *d. l.* § 1; — *l.* 9, *C. de leg. hæred.*; — *l.* 14, *eod.*; — *l.* 15, *eod.*; — *Nov.* 22, *c.* 47, § 2; — *Nov.* 118, *c.* 2; — *Nov.* 84, *c.* 1.

[c] See the preface to this second part, no. 4, and the remark on the sixth article of this section.

[d] Of King *Charles* IX., an. 1567.

SECTION I.

WHO ARE THOSE THAT ARE CALLED ASCENDANTS, AND IN WHAT MANNER THEY SUCCEED.

ART. I.

2849. *Who are the Ascendants.* — We use frequently the names of parents and ascendants to signify indifferently all the persons from whom every one derives his birth. And in this sense the father and mother are of the number of ascendants, and they are placed in the same line.[a] But because they are in the first degree, they are distinguished from the other ascendants; and the name of ascendants belongs more properly to grandfathers and the other ancestors above them.

II.

2850. *Who are the Grandfathers and Ancestors.* — We call by the name of grandfathers those who are in the degree immediately above the father and mother. Thus the name of grandfather belongs to the father's father and to the mother's father. And we call in general by the name of forefathers the great-grandfather and others above him.[b] But this last name is never made use of in the singular number, when we speak only of one ascendant.

III.

2851. *Ascendants of both Sexes.* — The rank of ancestors comprehends the two sexes. And as to what concerns successions, the ancestors of both sexes are called indifferently to those which may belong to them,[c] as shall be explained in the articles which follow.

IV.

2852. *In what Manner the Father and Mother succeed.* — The father and mother succeed equally to their sons or daughters who die without children. And if both the one and the other survive, they divide the inheritance between them; or whichsoever of the

[a] *L.* 4, § 2, *D. de in jus voc.* Although the French word *parent* does often in the French language take in the collateral relations, yet they often use it for the ascendants, as when one speaks of the duty of children towards their parents.

[b] *L.* 10, § 7, *D. de gradib. et affin.*

[c] *Nov.* 116, c. 2, *in f.*

two survives alone succeeds to the whole inheritance,[d] saving the goods which shall be spoken of in the following section[e]. But if the son or daughter to whom the father or mother, or both of them, are to succeed, had brothers or sisters of the whole blood, these brothers and sisters would have their share in the succession, as will be shown in the seventh article.[f]

V.

2853. *The Nearest Ascendants exclude the Remotest.* — If there are many ascendants who survive their common descendants, they who are in the nearest degree will exclude those that are more remote.[g] Thus, the father alone, or the mother alone, or both together, exclude the grandfathers and grandmothers, and the grandfathers exclude the great-grandfathers. For there is no representation among ascendants, as there is among descendants.

VI.

2854. *A Kind of Representation among the Ascendants.* — Although there be no right of representation among ascendants, to make those who are at the greatest distance to concur in the succession with the nearest; yet there is among them another kind of representation which has another effect. That is, when there are several ascendants who concur in the same degree, some of them by the father's side, and others by the mother's side; for if this case should happen, the succession of the descendants would be divided into two moieties, one of which would be given to the ascendants by the father's side, and the other to those of the mother's side, although the number should be less on one side than on the other; the paternal ascendants being considered as taking the place of the father, and the maternal as succeeding in that of the mother.[i]

[d] *Nov.* 118, *c.* 2. As to what concerns the mother, see what has been remarked in the preamble to this title.

[e] See the fifteenth, sixteenth, and seventeenth articles of the following section.

[f] See the seventh article of this section, and the remark that is there made on it.

[g] *Nov.* 118, *c.* 2. See the second and third articles of the second section of the foregoing title. The rule explained in this article is quite opposite to the spirit of the customs of France, which by the rule, *paterna paternis, materna maternis*, of which mention has been made in other places, prefer the remotest ascendants to those who are nearer, with respect to the goods descended from their stock. Which seems to be more equitable and more natural; and there seems even to be something of a hardship in the contrary rule. See the remark on the following article.

[i] *Nov.* 118, *c.* 2. This rule is not to be extended to any other of the provinces in

VII.

2855. *The Brothers and Sisters of the Whole Blood succeed with the Ascendants.* — The father and mother, and all the other ascendants, exclude all the collaterals from the succession of their children and other descendants, except the brothers and sisters of the whole blood, who succeed by the head with the father and mother, or other ascendants, to the succession of their brother or sister. So that if, for example, the father and mother, or one of them, or, in default of them, other ascendants, survive one of their sons, the succession will be divided between them and their other children, brothers or sisters of whole blood to the deceased, by equal portions, and by the head, according to the number of persons which the father, the mother, or, in default of them, the other ascendants, make together with their children.[1]

Remark on the Preceding Article.

2856. It is to be remarked on this rule touching the concurrence of brothers and sisters of the whole blood with the father, or mother, and the other ascendants, that several interpreters have been of opinion, that this concurrence took place only with respect to the father and mother; and that the other ascendants ought to be excluded by the brothers. And their opinion is grounded on these words of the text, *si et pater aut mater fuerint;* the meaning of which they took to be, that it is only the father and mother who can succeed jointly with the brothers, and that consequently the other ascendants do not concur in the succession. But besides that the whole sequel of this text calls to the succession, together with the brothers, the ascendants in the nearest degree, without any distinction, and that the condition even of the remotest ascendants is more favorable than that of the brothers; we need only to remark, that that which led those interpreters into this opinion was the fault of the translator of this novel, who, instead of

France, besides those which are governed by the Roman law. For in the provinces which are governed by their customs, the paternal goods being appropriated to the relations by the father's side, and the maternal goods to those related by the mother's side, the ascendants on one side exclude those on the other from the goods descended from their stock; and they succeed to them notwithstanding that other rule of the customs, that the immovables which come by descent from ancestors do not ascend; that is to say, do not go to the ascendants. For the motive and use of this rule is only to hinder the ascendants of one stock from succeeding to the estate descended from the other stock, that the said estate may not be transmitted from one stock to the other.

[1] *Nov.* 118, *c.* 2. See the following article.

these words in the Greek original, εἰ καὶ πατὴρ ἢ μητὴρ εἴησαν, which signify, *et si pater aut mater fuerint*, that is to say, that although it were even the father or mother, has put it, *si et pater aut mater fuerint*, that is, provided it be the father or mother. Having taken for an equivocal expression the words εἰ καί, *et si* for *si et*. So that whereas it is in the original, that the brothers succeed jointly even with the father and mother who are the nearest ascendants; they fancied that it was only the father and mother who had right to succeed jointly with the brothers, as if it were a favor granted to the father and mother, not to be excluded by the brothers.

VIII.

2857. *When the Ascendants, Brothers and Nephews, succeed together.* — If in the case of a brother or sister of the whole blood, who should succeed to a brother or sister jointly with the father or mother, or other ascendants, as has been said in the foregoing article, there should happen to be children of a brother of the whole blood that is deceased; the children of the said brother would succeed likewise with the ascendants, and with the brothers and sisters of the deceased, and would have among them the share which their father, brother to the deceased, would have had if he had lived.[m]

Remarks on the Preceding Article.

2858. Although in the text cited there is mention made only of the children of a brother, and not of those of a sister, yet there appears no reason to make any distinction between them. And it seems, that, as the rule explained in the preceding article calls to the succession the sisters, as well as the brothers, with the ascendants, the rule in this article ought not to exclude the children of sisters, since they represent their mothers, as well as the children of the brothers represent their fathers.

2859. But there arises from the rule of this article another difficulty, which proceeds from this, that the 127th novel speaks only of the case where the children of a brother succeed jointly with their uncle, brother to the deceased, and with an ascendant, and that it makes no mention of the case where there is no brother to the deceased, but only some ascendant, and the children of a brother that is deceased. Thus, it might be called in question

[m] *Nov.* 127, *c.* 1.

whether in this last case the children of the deceased brother should succeed with an ascendant, or whether they should be excluded by the ascendant, in the same manner as they would have been before this 127th novel, which has established this new right in their favor, contrary to the disposition of the 118th novel, which called only the brothers alone with the ascendants. But since this 127th novel, which calls the children of the brothers to the succession of their uncle, together with his other brothers and the ascendants, has only made mention of the case where there are brothers of the deceased, and says nothing of the case where there are no brothers, the most learned interpreters have been of opinion that this law has left the case, of which it makes no mention, to be decided by the 118th novel, which, by not calling them to the succession, excludes them from it. It would have been an easy matter for Justinian to have explained himself so as to have left no difficulty in this case. But perhaps this law, as well as many others, has been made with a view to some particular case, rather than with a design to make a general law for regulating all the cases which might be comprehended under it; and that for that reason the law was restrained to the particular case which gave occasion for it. To which we must add, that if it were necessary to examine the question whether, when the deceased has no brothers, but only nephews with an ascendant, the nephews ought to succeed together with the ascendant, it might be with some reason urged in favor of the nephews, that the change which is the occasion that the deceased has left no brothers behind him ought not to make their condition less favorable, nor deprive them of the right of representation, which is granted to them when there are brothers. But in reasoning upon what is determined in this case by these two novels, the 118th and the 127th, it may be alleged against them, that, on one side, the rules concerning the interpretation of laws direct, that the new laws which derogate from the old ones be restrained to that which they expressly determine:* and that, on the other side, the nephews have not the right of representation, except in the cases where these two laws have given it them; and that by the ancient law, when there were only nephews of the deceased to succeed to him, they divided the succession by the head, according to their number, without any representation.†

* See the sixteenth and eighteenth articles of the second section of the *Rules of Law*.

† See the last remark on the eighth article of the second section of the third title of this book.

IX.

2860. *Ascendants have the Right of Transmission.* — As children and other descendants succeed to their fathers and mothers, and other ascendants, in such a manner that the goods of the inheritance are acquired to them before they do any act as heir, or even before they know the death of the ascendant to whom they succeed; so fathers and mothers, and other ascendants, have the same right. And if, having survived their descendants, to whom they succeed, they should happen to die before they had entered to the succession, they would transmit it to their heirs.[n]

X.

2861. *Ascendants of Bastards.* — As we do not reckon in the number of children who succeed to their fathers and mothers, and other ascendants, those who are not lawfully begotten, so we do not place among the persons who have right to succeed to their descendants the fathers and mothers, or other ascendants, of this sort of children.[o]

SECTION II.

OF THE RIGHTS WHICH SOME ASCENDANTS MAY HAVE, EXCLUSIVE OF THE OTHERS, IN THE GOODS OF THE CHILDREN.

2862. All that has been said touching the succession of ascendants in the preceding section relates to the order in which they are ranked by the laws which call them to the successions of their descendants, and how they succeed according to their ranks. And in this section we shall explain some peculiar rights which some ascendants may have, exclusive of others, on the goods of their descendants.

2863. For the better understanding this matter concerning the rights of parents in the goods of their children, and the laws which relate thereto, it is necessary to remark that, by the ancient Roman law, the sons who were still in their father's family, that is to say, the children who were not emancipated, but were still under their father's authority, could have nothing of their own. And all that

[n] See the thirteenth article of the second section of the foregoing title, and the remark that is there made, as also the tenth section of *Testaments*.

[o] See the eighth article of the second section of *Heirs and Executors* in general.

could fall to them, either by succession or donation, or whatever they acquired by any other way, even by their own industry, belonged to the father,[a] saving only that which the son who was still under his father's authority might get either by his service in the army, or by his skill at the bar.[b] For what the son who was in his father's family had acquired by any of these two ways was entirely his own, his father having no manner of right to it, not so much as the usufruct of it; to which was afterwards added that which the son should acquire in the exercise of any public office or dignity, or in any employment that had a public salary annexed to it.[c] It was this sort of goods which they called by the name of *peculium*, and which they distinguished into *peculium castrense*, by which was meant all that they acquired in the war, and *peculium quasi castrense*, which comprehended all that was got by those other ways. There was likewise another sort of *peculium*, to wit, that which the father gave out of his estate to his son who was still in his family, whether it were in money or other things, that he might manage it apart, and improve it. But the profit of this *peculium* belonged to the father, as proceeding from his own estate.[d]

2864. As to the children who were emancipated, whatever they could acquire was their own; and this was one of the effects of emancipation, which was called for this reason the benefit of being able to acquire goods, *beneficium bonorum quærendorum*.[e]

2865. Afterwards the emperors gave to the children who were under their father's authority the property of the goods which they had of their mother, and of what they got in marriage, or by some free gift, and the fathers retained the usufruct of the said goods.[f] And at last Justinian ordered that all the goods which the children, even those who were not emancipated, should acquire, the same should be entirely their own, in whatever manner they acquired the said goods, whether by their own industry, or by succession, or by some liberality, or otherwise, but under two reserves; one was of the profit which the son, who was still in his father's family, might have made of the patrimony which his father

[a] § 1, *Inst. per quas pers. cuiq. acquir.*

[b] *D.* § 1;—*l.* 1, § 15, *D. de collat.*;—*l.* 1, § 6, *D. ad senat. Trebell.*;—*l.* 3, § 5, *D. de bon. poss.*

[c] *L. ult. C. de inof. test.* See the third article of this section.

[d] *Toto tit. D. de pecul.*

[e] *L.* 1, *D. si a parent. quis manum. sit.*

[f] *L.* 1, *C. de bon. mat.*;—*l.* 1, *C. de bon. quæ lib.*;—*l.* 5, *eod.*

had intrusted to his care and management, the property of the said profit belonging still to the father, as it did formerly according to the ancient law; and the other reserve was of the usufruct which Justinian gave to the father of all which the children who were not emancipated should acquire, except those sorts of peculiar patrimonies of which both the property and usufruct belonged wholly to the children by the ancient law, in which he made no manner of alteration.[g]

2866. These different dispositions of the Roman law with respect to the right of fathers in the goods of their children belonged likewise to the father's father, who had kept his grandchildren still under his power, and he had the same rights on their goods; but here we have made mention only of the father, and not of the grandfather, for a reason which shall be explained in the remark on the first article of this section.

2867. Seeing the subject-matter of this section takes in the distinction of children who are emancipated, and of those who are not, it is necessary to remark concerning emancipation that which has been said of it in the fifth and sixth articles of the second section of *Persons*, and to add thereto, that we see in the customs of France the distinction of children who are emancipated, and of those who are not; but with remarkable differences, which distinguish the said customs among themselves, and which distinguish them likewise from the provinces which are governed by the Roman law. These differences consist, not only in what relates to the rights of parents in the goods of their children not emancipated, but also in the ways by which children are held to be emancipated. Thus, as touching the rights of parents to the goods of their children not emancipated, there are some customs which give the usufruct, not only to the father, but also to the mother, and to the survivor of them, of the goods of their children, until they come of age. There are some customs which retain still something of the ancient Roman law, in that by the said customs donations made to children who are not emancipated belong to the father, notwithstanding the change which Justinian made in the said ancient law, as has been already taken notice of. Other customs, again, give to the father the property of all the movables which the son may chance to acquire before he accomplishes the age of five-and-twenty years. And other customs dis-

[g] *L.* 6, *C. de bon. quæ lib.*

pose differently concerning the same thing. And in some of them it is even said, that the paternal authority does not take place there.

2868. As to the ways by which children are held to be emancipated, the most universal is that which is almost everywhere in use by marriage, because the husband becomes thereby the head of his wife and family. Emancipation is likewise performed by an act made in due form.[h] There are some customs where the son is emancipated by his attaining the age of twenty years, others at the age of five-and-twenty, or if he has a public office,[i] or if he carries on a trade separately by himself, with the knowledge and approbation of his father and mother. There are, again, some customs where the son is held to be emancipated if he lives in a distinct habitation from his father, which may be gathered from the twenty-fifth novel of the Emperor Leo. In some customs marriage does not emancipate the children of noblemen, unless the same be therein expressly mentioned; neither does it emancipate persons of an inferior rank, until that after their marriage they have lived a year and a day out of the house, and separate from their fathers. And there are likewise some provinces which are governed by the Roman law, where marriage does not emancipate.

2869. We have made here these remarks concerning the different dispositions of the Roman law and of the customs of France, not only because of the relation they have to the subject-matter of this section, but to show by this diversity of dispositions, without mentioning others of the Roman law, which it would have been superfluous to explain here, that, as it has been remarked in other places, the matters which may be regulated by arbitrary laws are subject to this multiplicity of rules, not only in different places, but even in the same places, according to the times and the different views of those who have the right of making the rules.[l]

2870. It remains only that we should acquaint the reader, that, among the many rules relating to the subject-matter of this section, we have confined ourselves to those which are both agreeable to the Roman law, and most universally received; which takes in all the principles and rules which are most essential in this matter.

[h] *V. l. ult. C. de emancip. lib.*

[i] *V.* § 4, *Inst. quib. mod. jus pat. pot. solv.*; — *l. ult. C. de consul.*

[l] See the eleventh chapter of the *Treatise of Laws.*

ART. I.

2871. *The Father has no Right in the Property of the Goods acquired by the Children.* — Of all the goods which the children may acquire by their labor or industry, or which may come to them by any other title whatsoever, whether they be emancipated or not, whether they be adult or under the age of puberty, whether they be males or females, the father has no right in the property of them, which belongs solely to the children,[a] saving only the profit which may have arisen from the goods of the father, which he had put into the hands of his son who was not emancipated. For the property of the said profit would belong to the father;[b] but he has in the goods acquired by his son a right to the usufruct of them, which shall be explained in the following articles.

II.

2872. *The Father has the Usufruct of the Goods of his Children who are not emancipated.* — The father has the usufruct during his life of the goods which his children who are not emancipated may have acquired.[c] Unless it be of the goods that are excepted by the rules which follow.

III.

2873. *The Father has not the Usufruct of the Son's Peculiar Patrimony.* — The father has not the usufruct of what his son who is not emancipated may have of that sort of peculiar patrimony which is acquired either in the army or at the bar, or in the exercise of some dignity, of some office, or public employment.[d]

[a] *L.* 6, *C. de bon. quæ lib.*

[b] § 1, *Inst. per quas pers. cuiq. acquir.* In this article we have made mention only of the father, and not of the grandfather, with respect to the usufruct; and likewise in the following articles there is mention made only of the father; because that whereas by the Roman law the son who was married remained still in the power of his father, and that thus the grandchildren, as well as their fathers, remained likewise under the authority of their grandfather, who had for that reason the usufruct of their goods; by the usage in France, the son who marries being emancipated by the marriage, except in some particular places, as has been observed in the preamble to this section, the father has neither the property nor the usufruct of any thing that the married son acquires. And the usufruct of whatever the children of this married son may acquire belongs to their father, and not to their grandfather. But if it should so happen that the grandfather or father had little or no estate of their own, nor the usufruct of any goods belonging to their children or grandchildren, they would have always a right to take what is necessary for their maintenance out of the estate belonging to their children, as shall be shown in the tenth article.

[c] See the first of the texts cited on the foregoing article.

[d] *L.* 6, *C. de bon. quæ lib.*; — *v. l. ult. C. de inoff. test., et l. un. C. de castr. omn. palat.*

IV.

2874. *Nor of the Gifts of the Prince.* — We must likewise except out of the goods belonging to the son that is not emancipated, of which the father has a right to the usufruct, that which the son receives from the prince's bounty. For a benefit of this kind supposes at least an equal merit, if not a greater, with the bare service in the army. And the favors of the prince do not admit of any diminution, to the prejudice of those whom he is pleased to honor with them.[e]

V.

2875. *Nor of that which is given on Condition that the Father shall not have the Usufruct of it.* — The goods given to the son that is not emancipated, whether it be by any of his ascendants, or by other persons, upon this condition, that the father shall have no right to the usufruct of them, are excepted from the rule which gives the usufruct to the father; and this condition shall have its effect.[f]

VI.

2876. *The Father succeeding to his Son together with the Brothers, has not the Usufruct of their Portions.* — In the case where the father, surviving one of his children who left behind him brothers of the whole blood, succeeds to him together with the brothers, as has been said in the seventh article of the first section, seeing he has the property of one portion of the goods of his deceased child, he has not the usufruct of the portions belonging to his other children, brothers of the deceased.[g]

VII.

2877. *The Father's Duty in Relation to the Goods of which he has the Usufruct.* — The father who has the usufruct of the goods of his children is bound to take care of every thing that belongs to the said goods, to preserve the rights, to get in the debts, to

pecul. If a son who is still in his father's power should carry on a trade separately from that of his father, and that with his father's consent, would it not be just that the profit arising from the said trade should belong wholly to the son, as it is regulated by some customs, as has been observed in the preamble? *V. Nov. Leon.* 25.

[e] *L.* 7, *C. de bon. quæ lib.*

[f] *Nov.* 117, *c.* 1. There are some customs which make the same exception to the usufruct of the father which is explained in this article.

[g] *Nov.* 118, *c.* 2.

prosecute and defend the lawsuits, to lay out the necessary expenses, and in general to do every thing that a faithful administration requires.[h]

VIII.

2878. *The Father has the Property of all the Advantage that he makes by the Usufruct.* — If the father, having reaped some advantage from the said usufruct, makes any purchase therewith, or increases otherwise his estate thereby, he may dispose of the income thereof as he pleases; and whatever part thereof shall be found to remain in his succession, the same shall be common to all his children; and the child from whose goods he has reaped this profit shall have no greater share thereof than the others. For it was a right which the father had acquired, and which belonged to him in the same manner as his other goods.[i]

IX.

2879. *If the Father suffers his Son to enjoy the Profits, they are the Property of the Son.* — But if, on the contrary, the father who had the usufruct of the goods of one of his children lets the child himself reap the profits, the other children cannot after the father's death claim any thing on account of the said usufruct, nor of the advantage that has been made by it. For it was free for the father to abstain from the usufruct, and to let the child to whom the goods belonged enjoy the profits thereof.[l]

X.

2880. *Parents have their Alimony and other Necessaries out of their Children's Estate.* — Whether the father have some usufruct of the goods of his children, but which is not sufficient for his maintenance, or whether he has none at all, he ought to have out of the goods of his children, whether they be emancipated or not emancipated, that which may be necessary for his food, for his maintenance, for his necessaries during any sickness, and other such like wants, according to his quality and the value of the goods. And the mother, and all the ascendants both by the father

[h] *L.* 1, *C. de bon. mat.* See, in the title of *Usufruct*, the rules which may agree to the usufruct of fathers.

[i] *L.* 6, § 2, *C. de bon. quæ lib.*

[l] *L.* 6, § 2, *C. de bon. quæ lib.*

and mother's side, who happen to be in the like want, have the same right.[m]

XI.

2881. *Parents are bound to nourish and maintain their Children.* — As children are obliged to nourish and maintain their parents, so parents on their part are bound to take the same care of their children, not only because of the usufruct which they may have of their goods, but by the right of blood, and according as the estate of the parents may be sufficient for that purpose, unless it be that the children render themselves unworthy thereof. And in general it is a reciprocal duty between ascendants and descendants, that such of them as are able ought to maintain those who are in want.[n]

XII.

2882. *Parents and Children are not bound for one another's Debts.* — We must not reckon among the necessaries which parents have a right to have supplied out of their children's goods, the debts which they owe. For the duty of children towards their parents is limited to what may regard their persons. And it is the same thing as to the debts of the children with respect to their parents. But if a father, or other ascendant, were in prison for debt, and his son had the means of delivering him out of prison, by obliging himself to produce him when required, or to pay the debt if he was able, if the son should fail in this duty towards his father, his ingratitude would deserve that he should be disinherited according to the circumstances.[o]

XIII.

2883. *The Mother is not bound to maintain the Children, but in Default of the Father.* — This duty of nourishing and maintaining

[m] *L.* 1, *C. de alend. lib. ac parent.*; — *l.* 2, *eod.*; — *l.* 5, §§ 2, 3, *et* 4, *D. de agnosc. et al. lib.*; — *d. l.* § 19; — *l.* 5, *C. de patr. pot.* It is to be remarked on this article, that the fathers and mothers of bastards have the same right. And although the text quoted on this subject speaks only of the mother, yet it is the same equity with regard to the father, when he is known. And this duty is likewise reciprocal on the part of the parents towards the children of this kind. See the remark on the eighth article of the second section of the first title of the first book.

[n] *L.* 5, § 3, *D. de agn. et al. lib.*; — *l. ult. C. de alen. lib. ac parent.*; — *l. ult.* § 5, *D. de bon. quæ lib.*; — *l.* 5, § 12, *D. de agnosc. et alend. lib.*; — *Nov.* 117, *c.* 7, *in f.*

[o] *L.* 5, § 16, *D. de agnosc. et al. lib.*; — *l.* 1, *C. fil. pro patr. vel pat. pro fil.* See, concerning what is said of disinheriting, the third article of the second section of *Undutiful Testaments.*

the children belongs principally to the father, and the mother is not bound to it, except where the father's estate is not sufficient. Thus the mother, who, in case of the neglect or refusal of the father, or in case of his absence, has been obliged to supply her child with those necessaries out of her own estate, may recover it out of the father's estate, unless it shall appear that she has only given such things as she might have given out of a motherly affection, even although the father had maintained the child out of his own estate.[p]

XIV.

2884. *It is the same Thing with Respect to the Grandfather by the Mother's Side.* — The children of daughters cannot claim their maintenance out of the estate of their grandfather by the mother's side, except in the case where the father or grandfather by the father's side is not able to maintain them. For the children of the married daughter are under the power of their father, and out of the family of their grandfather by the mother's side.[q]

XV.

2885. *Two Sorts of Rights which Ascendants have in the Goods of their Children.* — All the foregoing rules respect the rights which parents have in the goods of their children during their children's life. And as to the goods which they leave behind them at their death, if they die without children, their nearest ascendants who survive them succeed to them, as has been explained in the preceding section, unless it be in such goods as are excepted by the following rules.[r]

XVI.

2886. *The Things given by the Ascendants revert to them.* — If in the inheritance of a person who dies without issue, and who leaves behind him a father and mother, or other ascendants, there should happen to be some goods which had been given to the said person by one of the ascendants who survive him, he who gave the said goods may take them back again, by virtue of the right which is called reversion, and he will exclude from them all the other ascendants, even the nearest, who would exclude him from the rest of the goods.[s]

[p] *L.* 5, § 14, *D. de agn. et al. lib.*

[q] *L.* 8, *D. de agn. et al. lib.*

[r] See the places quoted in the article.

[s] See the following section, where the right of reversion is explained.

XVII.

2887. *The Father takes back the Profits which have proceeded from his Goods.*—It is necessary likewise to remark, as an exception to the rule which calls jointly to the succession all the ascendants in the same degree, that, if a son who was not emancipated, whom his father had intrusted with the management of some small patrimony, had made any profit by it; his father and his mother happening to survive him, whatever profit had been made of the said patrimony which the father had intrusted the son with would belong to the father, he having as it were already a right to it before the son's death, as has been explained in the first article; and the mother would only have a share in the other goods which the son had acquired some other way. And it would be the same thing in the cases where the brothers of the whole blood should likewise succeed, whether it were with the father alone, or with the father and mother.[t]

XVIII.

2888. *The Change made by Second Marriages.*—We must in the last place take notice of one other cause which occasions some change in the rights of fathers, mothers, and other ascendants, to the goods of their children; which is the case where the father, mother, or other ascendant, who has children, happens to marry again, which is a matter that is necessarily to be distinguished, and which we shall speak of in its proper place.[u]

SECTION III.

OF THE RIGHT OF REVERSION.

2889. We have already spoken of the right of reversion in the sixteenth article of the foregoing section, where it was necessary to make mention of it, as being one of the rights which the ascendants have in the goods of the descendants; but we spoke of it there only in general, and for order's sake. And seeing this matter has some rules which are peculiar to it, they shall be explained in this section.

[t] § 1, *Inst. per quas pers. cuiq. acquir.* See the law quoted on the first article, in which there are these words, *Non ex ejus substantia cujus in potestate sit.*

[u] See the fourth title of the third book.

2890. The right of reversion, which gives back again to the ascendants the things which they had given to their descendants, who die before them without leaving behind them any children, is so natural, that it has been equally received both in the ancient and modern Roman law; and it is likewise received in France, both in the provinces which are governed by their customs, and in those which follow the Roman law. We see in the laws two motives of equity, which make this right of reversion to be just and favorable. One is, to give to the ascendants this comfort, of not suffering at the same time the double loss of their children and of the goods which they had stripped themselves of in their favor.[a] And the other motive, which is a consequence of the former, is not to discourage ascendants from exercising their liberality towards their descendants, as it might happen if they should have any reason to fear this double loss.[b] But although these motives of the right of reversion regard equally the father and mother, and all the ascendants by the father and mother's side, yet the reversion was limited in the Roman law to the father, and to the ascendants by the father's side, who had in their power the children to whom they had given any thing; and the mother, with the ascendants on her side, had not this right unless they had stipulated it.[c] And some interpreters have been of opinion, that Justinian had entirely abolished this right, and that the father and grandfather by the father's side were excluded from it by his 118th novel, because that by the said law he calls equally the ascendants to the successions of the descendants, according to the order of their proximity, without reserving to them this right of reversion; from whence they have concluded, that if, for example, a grandfather by the father's side had made a gift to his grandson, who should happen to die, leaving behind him his mother and this grandfather, the mother would exclude the grandfather from having that which he had given to his grandson.

2891. This interpretation, which is so widely different from the spirit of the said law, has not been received in France, and it may be said that the words of this novel of Justinian cannot have this effect. For this right of reversion, which is so expressly established by several laws, and so equitable that it is as it were a

[a] *L.* 6, *D. de jure dot.*; — *l.* 4, *C. solut. matr.*

[b] *L.* 2, *C. de bon. quæ lib.*

[c] See the texts cited on the second article, and the remark that is there made upon it. *V. Nov. Leon.* 25.

part of the law of nature, could never be abolished by a law that makes no mention of it. And we should have reason to exclaim against the hardship of a law which should ordain, in the case which we have just now mentioned, that the mother should exclude the grandfather from the right of reversion. Thus, Justinian not having expressly abolished this right by the said novel, it ought to subsist, according to that rule concerning the interpretation of laws which directs us to reconcile the ancient laws with the new, by interpreting the one by the other, and giving to them all the just effect which their intention demands, in every thing where they are not contrary to one another, and in that which the latter laws have not abrogated.[d] But if this rule comprehends likewise the arbitrary laws, it ought with much more reason to be understood of the laws that are founded on natural equity, and especially those which, as this law touching the right of reversion to ascendants, have for their principles truths which cannot be called in question without a kind of inhumanity.

2892. If, therefore, we examine this 118th novel according to this rule, we shall find nothing in it that may give us any reason to think that Justinian had a design to abolish the right of reversion. And it may likewise be added, that the natural effect of the right of reversion is to make the goods that are subject to it, not to be considered as a part of the succession of the person to whom they had been given, but to be excepted and separated from the succession, in order to be returned to the ascendant who has this right. For the gifts of ascendants to their descendants imply this tacit condition, that, if it happens that the donor survives the donee who dies without children, he shall take back again that thing which he stripped himself of only with the view of transmitting it to his descendants. Thus, this thing, with respect to the ascendant who gave it, may be considered as not being a part of the inheritance of the donee, and by consequence not subject to the laws which regulate successions.

ART. I.

2893. *Definition of Reversion.* — By the right of reversion is meant the right which a donor who survives his donee has to take back the things which he had given him, as shall be explained by the following rules.[a]

[d] See the eighteenth article of the second section of the *Rules of Law.*

[a] *L. ult. C. comm. utr. jud.*

II.

2894. *Two Sorts of Reversion, either by the Law or by Agreement.* — We ought to distinguish two sorts of the right of reversion: that which the law gives to fathers and other ascendants, although there be no agreement about it; and that which has been stipulated by an express agreement, whether it be by an ascendant or any other donor, even a stranger,[b] that is to say, one to whom the donee is noways related.

III.

2895. *The Reversion by Agreement is regulated by the Agreement.* — The reversion by agreement hath its effect, such as it is settled by the agreement, whether it be between ascendants and descendants, or other persons.[c]

IV.

2896. *Reversion of Things given in Favor of Marriage.* — If a father, a mother, or other ascendant, having endowed a daughter, or made some present to one of his or her children or descendants, in favor of marriage, survives the donee who dies without issue, the donor shall take back the things. And although the reversion of the said things has not been expressly stipulated, yet the donor shall have them before any other heir, and even preferably to the nearest ascendant, who, perhaps, may exclude him from the inheritance of the said donee.[d]

Remarks on the Preceding Article.

2897. Although the texts cited on this article, and those which have been quoted on the first and second articles, do not extend to

[b] *L. ult. C. comm. utr. jud.*; — *l. un.* § 13, *C. de rei ux. act.*; — *d.* § *in f.*; — *v. Ulp. tit.* 6, § 5; — *v. Nov. Leon.* 25. Although the reversion which is mentioned in these last texts was of a larger extent than that which is spoken of here, and had this effect, that the dowry was restored to the donor, not only in the case where the daughter that was endowed died, but even in her lifetime in case of a divorce; yet we have added these two texts, in order to observe therein two things. One is, that when a stranger gave a portion with a woman in marriage, he had not this right of reversion, unless he had stipulated it: and the other is, that they reckoned in the number of strangers even the mother and the ascendants by the mother's side, because they had not the daughter in their power. See, touching this remark, that which is made on the fourth article.

[c] The agreement about the reversion having nothing unlawful in it, it hath its effect according to the rules of covenants. See the texts cited on the foregoing article, and the eleventh article of the second section of *Dowries*. See the close of the remark on the fifth article.

[d] *L.* 6, *D. de jure dot.*; — *l.* 4, *C. sol. matrim.*; — *l.* 17, *in f. D. de senat. Maced.*; — *l.* 2, *C. de bon. quæ lib.* See the sixth, seventh, and eighth articles of the second section of the title of *Dowries*.

the mother, and the other ascendants by the mother's side, yet we have nevertheless comprehended in the article all the ascendants without distinction. For according to the usage in France, they have all of them this right of reversion, and the same equity makes the reversion to be as just on their part as on the part of the father. There are even some customs in France which extend the right of reversion, not only to the mother, and the ascendants on the mother's side, but even to collateral relations, even although there be no agreement for so doing. And this right is likewise given to collaterals in some places in France which are governed by the Roman law; but in other places they have it not, except where it is expressly stipulated.

2898. We must remark on this article, that although these dispositions of the Roman law regard only dowries and donations made in favor of marriage, yet, seeing the right of reversion is no less just in the other sorts of donations, the greatest part of the customs in France have extended it to all donations in general by express dispositions. And it is the common usage in France, both in the customs which have made no express provision therein, and likewise in the provinces which follow the Roman law, that the reversion in favor of ascendants takes place in all sorts of donations, although there be no express stipulation to that purpose.

2899. We must likewise further observe, in relation to the same dispositions of the Roman law, that they do not distinguish the case where the descendant, who is the donee by his contract of marriage, dies without issue, from that in which he leaves children behind him; which gave rise to a question, which usage has decided between two parties, one of which pretended, that although the descendant who was the donee left children behind him, yet the reversion took place; the other alleging that the reversion was not to take place but in the case where the donee died without issue.[a] It is this second opinion that has been established as the rule: and it is so just and so natural, that it may be said that it is not only the plurality of voices, but that it is also reason, which has established it as a rule; since donations in favor of marriage, and the dowries of daughters, have the same end as marriage, and respect not only the donees, but likewise their descendants. From whence it follows, that when there are children who survive their fathers or mothers, to whom the donation had been made in favor

[a] It may be observed touching these opinions, that both the one and the other have some foundation in the Roman law. *V. l.* 12, *D. de pact. dotal.*; — *Ulp. tit.* 6, § 4.

of marriage, the motive of the donation subsists in their persons; and they make the motive of the reversion to cease, which is to prevent the donor's falling at the same time into the double loss both of his goods and of his child, as has been observed in the preamble of this section. For if the donee leaves children behind him, the ascendant who was the donor, and who survives him, considers in those children the person whom they represent, and he sees the goods which he had bestowed pass to the use which engaged him to give them away.

2900. Seeing the consideration of the children of the donee makes the reversion to cease when the children survive him, a question has been started, whether in this case the right ceases in such a manner that, if the said children should happen to die before the ascendant who was the donor, he would be deprived of the right of reversion. But because the said children are considered themselves as donees of their grandfather, as we have just now observed, it would seem that it might be urged, that, the donation being continued in their persons, the right of reversion was only suspended in their favor, and that it begins to have its effect whenever the donation ceases to have its effect by their death. For in that case this donor who survives both the donee and the donee's children is in the same condition as if he had survived the donee dying without issue. Since by his surviving all this branch of his descendants, on whose account the donation was made, he survives in effect his donees, and comes within the motive of the laws which grant the right of reversion.

2901. Although the donation was not made in favor of marriage, yet it seems that it would be fully as equitable that the children of the donee should make the reversion to cease in that case; and that, on the contrary, it should take place if the donor did survive the donee and his children. For every donation from an ascendant to a descendant has a view to the settlement of the person and family of the donee; and the motives of the rules of reversion, which we have just now explained, seem to be common to all sorts of donations in favor of children.

V.

2902. *This Right does not hinder the Profits which arise out of the Goods subject to the Reversion.* — In the case of the preceding article, the profits which the wife of the donee has a right to out of the donation made to her husband by his father or other

ascendant, in favor of their marriage, and the profits which the husband has a right to in the same manner out of his wife's marriage portion, would have their effect; and the reversion would be diminished by those kinds of profits, whether they were regulated by the contract itself, or by custom, or some other law. For this donation and this dowry being in favor of the marriage, they ought to follow the conditions thereof, which are such, that whatsoever is given to the wife is subject to the rights of the husband; and whatsoever is given to the husband is likewise subject to the rights of the wife, unless it has been otherwise agreed on.[e]

Remarks on the Preceding Article.

2903. Although there should be no covenant to regulate these profits, as there was in the case of the text cited, yet if they are regulated by custom, it is equally just that they should diminish the reversion. For the donor knew sufficiently this consequence of his donation, and that the goods which he gave would be subject to these sorts of profits. Which regards as well the profits that the wife has a right to out of the things given to her husband, as the profits which the husband has a right to out of his wife's marriage portion. And since the text cited on this article takes in the whole dowry, according to the agreement that had been made, with much more reason may it be applied to the profits which consume only a part of it.

2904. If, besides the profits that belong to the wife out of the things given to her husband, she had likewise her dowry to recover, and the other goods of the husband were not sufficient to answer the same, would the reversion, of which the case had happened, the husband being dead without children, hinder the wife from recovering her dowry out of the things given to the husband? Seeing this restitution of the dowry is a consequence of the contract of marriage, the things which are given to the husband ought to be comprehended among the goods of the husband which are responsible for the dowry; and this is a charge which the donor could not be ignorant of, since the dowry was promised only on the assurance that all the goods belonging to the husband should be answerable for it; which included particularly the things given on account of the marriage, unless they had been excepted by an express clause.[a]

[e] *L.* 12, *D. de pact. dot.*

[a] See the seventeenth article of the first section of *Substitutions* direct and fiduciary.

2905. But if the donee had contracted debts, could his creditors hinder the effect of the reversion? Or could the donor allege against the creditors, that the goods which he had given are appropriated to him in the case of the reversion, and that the donee could not mortgage them to his prejudice, no more than an heir who is charged with a substitution can engage the goods which are subject to the substitution? And would it likewise be said that this donee could not alienate the goods subject to the reversion, nor dispose of them by testament?

2906. As to the alienation and mortgage of the goods which are given, we must consider what are the motives of the donations made by ascendants to their descendants, and judge by those motives of the use that the donee may make of the things given him, what right he has to them, and what right the donor has still in them. The intention of the ascendants who make presents to their descendants is always, without doubt, that the goods which are given may serve towards the settlement of the donee, and to all the uses that shall be consequences of the said settlement, which implies all the uses that any master of a family may make of the goods for his person and for his family. Thus, this donee has over those goods which are given him the right to make use of them according as his affairs shall require; which supposes the liberty of using them in the same manner as any proprietor may use the goods that are his own. And the donor has on his part his right of reversion in the said goods, if the case does happen.

2907. If we put in the scales this right of the donor, and that of the donee, in order to give to the one and to the other their just effect, we see that, the donee being master of the things given him, and given towards his settlement, it is a consequence of such a donation, that he may use them according as his affairs shall oblige him, and as the said settlement and all its consequences may demand. Which implies the necessity of using them so as to mortgage and alienate them. For if, for example, this donee is a person that has occasion to purchase an office, it will become just and necessary that the creditors who shall lend him money upon a mortgage of the goods given, or those to whom he shall sell them in order to lay out the price in the purchase of the said office, should have nothing to fear on the score of the right of reversion, since their security upon the office might fail them in case it be suppressed, or fall in its value. From whence it follows, that a donee may for any other affair mortgage the goods which are

given him, as well as the rest of his goods; and that what he may do for one affair, he may do for all others, since the right of reversion does not put the donee under tutorship, and does not oblige him to examine so nicely whether he employs to advantage the goods which the donation has made him master of; and that the creditors of the said donee are not bound on their part to take any other precautions than those which are usually taken with all debtors who possess only free goods, which they may dispose of as being absolutely masters of them, since the reversion ought not to be compared to a substitution, which leaves no liberty to the possessor to dispose of the goods to the prejudice of the person who is substituted to them; otherwise it would be necessary that a contract of marriage, in which a father endows his daughter, should be made public as a substitution, in order to preserve to him his right of reversion. And it is so just and so natural that the reversion should cease with respect to the creditors of the donee, that some customs in France, which ordain that the goods given by ascendants should return to them without the burden of the debts of the donee, do add, that the goods given are nevertheless subject by way of supplement to the debts of the donee, in case his other goods should not be sufficient to discharge them.

2908. Lastly, it may be said, that the nature and proper character of the right of reversion is to distinguish, in the mass of the goods belonging to the succession of the donee, the things that were given, and that are subject to this right, in order to take them out of the mass, and to return them back to the donor, not as if he had always remained proprietor of them, but as succeeding to such of the said goods as remain still in the inheritance. Thus, it is by a kind of succession that the donor takes back the things which he had given; and we see that some customs in France, instead of giving to fathers and mothers, and other ascendants, the reversion of the things given to their children and descendants, do barely ordain that they shall succeed to the things which they gave them. It follows from this nature of reversion, whether we will consider it as a succession to the things that are given, or as a right independent of the quality of heir, and which the ascendant, who is the donor, acquires a right to by the donation itself, that the effect of this right is limited, according to the nature of such donation, to distinguish in the inheritance the things that were given, in order to take them away from any other heir besides him who has the right of reversion; but that the reversion

ought not to have the retroactive effect of an appropriation, which may hinder the donee from mortgaging or alienating the goods, and which may turn, not only to the prejudice of the donee, but even to the prejudice of third persons, who had reason to look upon the things that were given as being a part of the donee's goods, as well as the other goods which he possessed by any other title. And although it may be said against the creditors who were prior to the donations, that they had not reckoned upon the goods which were given to their debtor after their debt was contracted, yet their condition ought not to be distinguished from that of the creditors who were posterior to the donation. For besides that the condition of the last creditors ought not to be better than that of the first, the goods which the debtor should afterwards acquire were likewise engaged to his prior creditors, and the destination of the things that were given for the use and benefit of the donee implied much more the acquitting of what he already owed, than the facility of borrowing and contracting new debts.

2909. Although the donee may dispose of the goods given him to the prejudice of the reversion by alienating or mortgaging them, it does not thence follow that, if he commits any crime, he subjects the said goods to confiscation. For this kind of engagement is not of the nature of those which hinder the effect of the reversion, since, on the contrary, the civil death of the donee who is condemned ought to have the same effect to make way for the right of reversion as the natural death would have; but if the condemned person had children, it might be said, in behalf of the forfeiture, that the case of the reversion had not happened, and that therefore the forfeiture ought to take place; since, the children hindering the effect of the reversion, the things that were given would still belong to the donee that is condemned, and by consequence would be included in the forfeiture. But since the children make this right of reversion to cease, when they survive after the natural death of the donee their father, and since the goods fall to them by the said death, might we not give the same effect to the civil death, and make the said goods to pass to the children of this donee, not as a succession which should give them the right of their father, for the condemned person has no heirs, but as an effect of the donation and of the intention of the donor, who, because of the incapacity which has happened to the donee, would have the things given to pass to the donee's children? for they were not only given to this donee, but the intention of the donor was,

that the children should have them after their father, preferably to himself. Or we might under another view consider the donee as being dead without children, since he died without heirs; and restore to the donor the things which he had given, but with the charge of keeping them for the children of his child to whom he had made the donation. This we thought fit to mention, because it has been adjudged after this manner in one of the parliaments of France, and because this temperament seems to be conformable to equity, and to the spirit of the rules of law.

2910. As to the dispositions which the donee might make by a testament, we see that some of the customs in France have limited this right of reversion to the case where there are no children and no disposition made by the donee; which leaves a liberty of disposing to the prejudice of the reversion, both by alienations and by dispositions made in prospect of death. And this rule seems to be taken from the 25th novel of Leo, where he blames, as an abuse which had crept in contrary to the ancient law, the usage of not being at liberty to dispose by testament, to the prejudice of the reversion; and he reëstablished the said liberty, reserving only to the donor his legitime, or the Falcidian portion. But we see, on the contrary, in some provinces which are governed by the written law, that they observe there a law that is quite the reverse, which favors in such a manner the right of reversion, that not only the donee cannot dispose of the things that are given him by testament, but that he cannot even alienate or mortgage them.

2911. From these two extremes, the one, which permits the donee without distinction either to alienate, to mortgage, or to dispose by testament; and the other, which takes from him the liberty of all manner of disposition whatsoever; it has happened that in some places, where the law touching this matter is not so precisely determined, there have arisen several lawsuits touching the validity of dispositions made by donees, to the prejudice of the right of reversion which the law gives to ascendants who are donors; which has made many people wish that some provision were made therein. And if it may be allowed in the mean while to make one bare reflection on rules which are so opposite the one to the other, it would seem that, as to the alienation and mortgage, the reasons which have been observed render the rule or usage which allows them favorable; and that as to testamentary dispositions, as they are not of the same necessity for the behoof

of the donee as is the liberty of mortgaging and alienating, so neither are they within the intention of the donor, but, on the contrary, we ought not to presume that he intended that a legatee should be preferred to him, it would not seem unjust that the reversion should take away the liberty of disposing by testament. And if, for instance, a grandfather by the father's side had given to his grandson an estate in land situated in a country that is governed by the Roman law, and the said grandson had devised it to his mother, who survived him, together with his said grandfather, or if he had devised the said land to one of his friends, it would seem to be consonant both to humanity and equity that the said grandfather should have that effect of the right of reversion, so as to have the preference both of the mother and also of the stranger; and that we might with very good reason, and without trespassing against the principles and spirit of the laws, judge that the said legacy had proceeded either from a principle of ingratitude in the donee, if he thought that the donor would outlive him, or from a persuasion that his grandfather would die before him. And either the one or the other of these considerations, being backed with the favor of the right of reversion, might unjustly make the said legacy give place to the right of reversion, and introduce the rule of the provinces where testamentary dispositions are prohibited, to the prejudice of the right of reversion. And as it would be neither reasonable nor possible to make the validity of the dispositions of donees, to the prejudice of the right of reversion, to depend on the quality and circumstances of the said dispositions, so as to ratify and confirm some of them which might be favorable, and to annul others as containing some hardship, and likewise because the rule ought to be simple and uniform, it would seem just, if there were a necessity of making a choice between these two opposite rules, to annul rather all dispositions of donees made to the prejudice of the right of reversion, than to confirm them all without distinction; and this rule, as well as that which permits the alienation and the mortgage of the said goods, would be without any manner of inconvenience. For those who should be afraid of the effect and consequences either of the one or the other, might regulate the conditions of the donations, and of the reversion, as they should think fit, and either restrain or enlarge by their covenants the liberty to alienate, to mortgage, and to dispose by testament; for covenants of this kind would be very lawful.[b]

[b] See the twenty-seventh article of the second section of the *Rules of Law*.

2912. All that has been said hitherto concerns the right of reversion as it is regulated by law, although there has been no agreement about it. But if the reversion is stipulated by an express covenant, whether it be by an ascendant or any other person, relation or stranger to the donee, the reversion in that case will have the effect which it ought to have by the covenant. And unless it makes express mention of the liberty to dispose, it is the common opinion, that, as an express stipulation seems to have more force than that which is barely given by the law, the reversion which is founded on an agreement hinders all dispositions; which is still more equitable with respect to donors who are not ascendants. For since they have not the same affection for the establishment of the donees and their families as ascendants have, it is natural to presume that the covenant by which the reversion is stipulated takes away from the donee the liberty of all dispositions to the prejudice of the donors.

2913. We have perhaps enlarged too much on a subject which has but a few rules in the Roman law; and perhaps, likewise, we have said too little on a subject that is of so frequent use and so full of difficulties. But we thought that, without entering into a particular inquiry into the several sorts of difficulties, which would be endless and of no profit, it was necessary to take notice of the most material; and that it might be sufficient for deciding all those which may arise, to establish the principles on which the decisions may depend.

VI.

2914. *The Father has the Reversion of the Dowry given by the Grandfather on the Father's Side.* — If a young woman that is endowed by her grandfather on the father's side, having survived her grandfather, dies without children, her father being alive, the father takes back the dowry as if he himself had given it, although he be not heir to his father, who was grandfather to the daughter; and he excludes from it the mother, and the other children whom he has by her, and who might succeed with him. For as it is the duty of the father to endow his daughter, so it was for the father's sake that the grandfather did endow his granddaughter. And this dowry reverts to him by a double right, both as representing his grandfather, and as taking back a gift which his father had given for him, and on his account. Which is the reason why this right is in his person independent on the quality of heir to his father,

grandfather to the daughter, and that it was acquired to him in a manner from the moment of the donation, that it might have its effect whenever the case thereof should happen.[f]

TITLE III.

IN WHAT MANNER BROTHERS, SISTERS, AND OTHER COLLATERALS, SUCCEED.

2915. We have seen in the preamble of this second book, that there are three orders of persons whom the laws call to the successions. The first is that of children, and other descendants. The second, of fathers, and mothers, and other ascendants. And the third is of collaterals; who are so called, because they descend, every one by his line from father to son, from an ascendant that is common to them; which is the reason that they are placed one at the side of the other, underneath the person from whom they descend.

SECTION I.

WHO ARE THE COLLATERALS.

Art. I.

2916. *Definition of Collaterals.* — By collaterals are meant all those who, being neither ascendants nor descendants to one another, are descended either from the same father, or the same mother, or from another ascendant that is common to them. Thus, brothers and sisters are collaterals to one another; thus, the uncle and nephew are also collaterals to one another; and cousins the same.[a]

[f] *L.* 6, *D. de collat.* Although the law cited on this article seems contrary to the 79th law, *D. de jure dot.*, yet we thought that the equity which was the motive thereof ought to make the rule, without its being necessary to examine in what manner these two laws may be reconciled.

[a] *L.* 1, *D. de grad. et affin.*; — *l.* 9, § 1, *C. de natur. lib.*

II.

2917. *Three Kinds of Brothers: Brothers of the Whole Blood, Brothers by the Father's Side, and Brothers by the Mother's Side.* — Among the collaterals, the nearest are brothers and sisters,[b] who are of three sorts. Those who are born of the same father and of the same mother,[c] whom we call brothers of the whole blood; those who are born of one and the same father, but of different mothers, who are called brothers by the father's side; and those who have one and the same mother, but different fathers, whom we call brothers by the mother's side.[d]

III.

2918. *Uncles, Aunts, Nephews, and Nieces.* — The nearest of kin after brothers and sisters are uncles and aunts; that is to say, the brothers and sisters of the father or mother: and nephews and nieces; that is to say, the children of brothers or sisters.[e]

IV.

2919. *Divers Sorts of Uncles, Aunts, Nephews, and Nieces.* — As we must distinguish among brothers and sisters those who are brothers or sisters of the whole blood, that is to say, by the same father and mother, from those who are only of the half blood, that is, who have only in common the same father, or the same mother; so likewise among uncles and aunts we may distinguish between those who are brothers of the whole blood to the father or mother, and those who are only brothers by the half blood, that is, either by the father's side alone, or by the mother's side alone. And the same distinction may be made among nephews and nieces, between those who are children of brothers or sisters of the whole blood, and those who are children of brothers or sisters by the half blood.[f]

[b] *L.* 1, *D. de grad. et affin.*

[c] *Nov.* 118, *c.* 3.

[d] *D. c.* 3.

[e] *L.* 1, § 5, *D. de grad. et affin.*

[f] We take notice here of these several sorts of uncles and aunts, and of nephews and nieces, in order to distinguish these different kinds of relations. For although these differences are not considered in the Roman law, which restrains to brothers and sisters alone the distinction of brothers by the whole blood and brothers by the half blood, and calls to successions all the other collaterals according to their degrees, without distinguishing whether they be related by the father alone, or the mother alone, or by both, as shall be explained in the ninth article of the following section; yet it is necessary to know these different sorts of kindred; and they are of use in the customs of France, which appropriate estates inherited by descent to the nearest of kin on the side, and in the line, from which they descended; as has been already remarked.

V.

2920. *Great-Uncles and Great-Aunts.* — The great-uncle is the brother of the grandfather or grandmother, whether it be by the father's side or mother's side. And the brothers of the remoter ascendants, such as great-grandfather, great-grandfather's father, and others, are likewise comprised in our language under the name of great-uncles; who may be distinguished by the degrees of first or second great-uncle; and it is the same thing with respect to great-aunts, whether those great-uncles and great-aunts be related by the whole blood or by the half blood to the ascendant whose brothers and sisters they are.[g]

VI.

2921. *Grandnephews and Grandnieces.* — The grandnephew is the nephew's son, grandson to the brother or sister, whether he be descended of the whole blood, or of the half blood. And all the descendants of nephews are likewise called grandnephews, who may be distinguished by the degrees of first and second grandnephew. And what is here said of grandnephews ought likewise to be understood of grandnieces.[h]

VII.

2922. *Cousins.* — All the other collaterals are comprehended in our language under the name of cousins; the nearest of which are the children of brothers and sisters, whom we call cousins-german; whether they be the children of brothers of the whole blood, or of the half blood. And it is the same thing with respect to the children of sisters, whether they be sisters of the whole blood, or of the half blood; or to the children of brothers and sisters. For in what manner soever the brothers and sisters are linked together, the name of cousins-german is given indifferently to the children of the one with respect to the children of the other. And as for the other cousins more remote, they are to be distinguished according to their ranks, in the orders of the collaterals, which shall be explained in the following articles.[i]

VIII.

2923. *First Order of Collaterals.* — We must distinguish in the collaterals of any person three different orders. The first is of

[g] *L.* 1, § 6, *D. de grad. et affin.*; — *v. l.* 10, § 15, *et seq.*
[h] *L.* 1, § 6, *D. de grad. et aff.*; — *v. l.* 10, § 15, *et seq.*
[i] *L.* 10, § 15, *D. de grad. et affin.*

those who are placed at the side of that person in the same line, in such a manner that they are all equally distant with the said person from the first ascendant that is common to them. Thus, brothers and sisters are at the same distance from their father. Thus, cousins-german are at the same distance from their grandfather. And second-cousins are at the same distance from their great-grandfather.[l]

IX.

2924. *Second Order of Collaterals.* — The second order of the collaterals of any person is of those who are at a less distance than they from the first ascendant that is common to them. Thus, the uncle is not in so remote a degree from his father as is his nephew, who is grandson to his father. Thus, the cousin-german of the father of any person, who is called uncle according to the way in Brittany, being grandson of the great-grandfather of the said person, is not at so great a distance as that person is from the said great-grandfather. Thus, the cousins-german of all the other ascendants of any person are less remote than the said person from the first ascendants who are common to them.[m]

X.

2925. *Third Order of Collaterals.* — The third order of the collaterals of any one is of those who are more remote than the said person from the first ascendant that is common to them. Thus, the nephew is at a greater distance from his grandfather than his uncle, who is son to the said grandfather. Thus, the son of the cousin-german of any person, who is called uncle after the manner of Brittany, is at a greater distance from his great-grandfather, who is their first common ascendant. Thus, all the descendants of cousins-german, and of the others who are in the first order, are more remote than the said person from the ascendant of whom they are all descended.[n]

[l] This is a consequence of the preceding articles, and which may be easily understood by a view of the table of kindred.

[m] See the figure.

[n] See the figure.

SECTION II.

THE ORDER OF THE SUCCESSION OF COLLATERALS.

2926. It is to be observed on this section, that whatever shall be said therein touching the proximity among collaterals, who exclude one another according as they are nearer, is to be understood only with regard to the provinces in France which are governed according to the written law. For in the customs of France there are two contrary rules. One which is common to all the customs, which calls to the succession of estates inherited by descent, not the nearest collaterals without distinction, but those who are nearest on the side from whence the said estate of inheritance descended. Thus, the cousin-german on the father's side of the deceased will succeed to him in the goods which descended to him from the father's side, although the deceased had left behind him a brother by the mother's side, who was nearer to him than the said cousin-german. The other rule, which is peculiar to some customs, is that which admits of representation in the collateral line to an infinite degree, which makes that collaterals of a more remote degree are not excluded by others who are nearer.

Art. I.

2927. *Brothers are the first in the Order of Collaterals.* — The succession of one that dies without children, or other descendants, and without father or mother, or other ascendants, passes to the collaterals. And if the deceased had brothers or sisters they will succeed in the first place,[a] and will exclude all the others. But brothers and sisters succeed differently, according to the distinctions which shall be explained in the following articles.

II.

2928. *Brothers of the Whole Blood exclude the others.* — If the person whose succession is to go to his brothers alone, when there is no descendant or ascendant, hath left behind him brothers of the whole blood, and likewise other brothers of the half blood, whether they be by the father's side alone, or by the mother's side alone, or of both these kinds, the brothers of the whole blood, who

[a] *Nov.* 118, *c.* 3.

would have concurred with the ascendants if there had been any, will succeed all alone, and exclude the others,[b] and their descendants.[c] And this rule, as well as those which follow, is to be understood of sisters as well as brothers, whether the sisters be alone, or that with them there are likewise brothers, seeing their condition ought to be equal. But for the greater clearness, and for brevity's sake, we shall only name the brothers alone.

III.

2929. *The Children of Brothers of the Whole Blood concur with their Uncles.* — If, together with the brothers of the whole blood, there are children of another brother of the whole blood, who died before the brother whose succession is to be divided, those children will represent their father, and will concur with their uncles, brothers to the deceased; and will have among them all the share which their father would have had if he had been alive.[d]

IV.

2930. *The Children of the Brothers of the Whole Blood exclude the Brothers of the Half Blood.* — If the deceased left behind him no brothers of the whole blood, but only children of a brother of the whole blood, that had died before him; and if there were alive brothers of the deceased by the half blood, either by the father's side alone, or the mother's side alone, or of both these sorts together; the children of the brother of the whole blood, nephews to the deceased, would be preferred before their uncles, brothers to the deceased by the father's side alone, or by the mother's side alone,

[b] *Nov.* 118, c. 3. See, concerning what is said in this article of the brothers concurring with the father and mother and other ascendants in the succession of their brother, the seventh article of the first section of the second title.

[c] *Nov.* 118, c. 3.

[d] *Nov.* 118, c. 3. We must observe in this article the first case of the representation among collaterals. See, touching this right of representation, the fourth, sixth, seventh, and eighth articles; and as for the representation in the direct line, see the second and third articles of the second section of the first title.

It may be remarked, in relation to the right of representation among collaterals, that the said right hath its bounds, as it is explained in this article, and in the fourth, sixth, seventh, and eighth articles, and that it hath likewise the same bounds in many of the customs in France; but in some of them the representation takes place in the collateral line without any limitation, as has been observed in the preamble to this section: and that in other customs there is no representation at all in the collateral line, unless the same has been established by covenant; and that there are even some customs which have abolished the representation in the direct line of descendants, as has been remarked on the second article of the second section of the first title.

and would exclude them from the succession in the same manner as their father would have done if he had been alive; and although they are in a remoter degree than their uncles, yet, representing their father, they come in his place.[e]

V.

2931. *Brothers by the Father's Side alone, and those by the Mother's Side alone, concur together.* — When there are no brothers of the whole blood, nor any of their children, and there are brothers either by the father's side alone, or by the mother's side alone, or brothers of both these sorts, they divide among them indifferently the succession by equal portions, according to the number of persons.[f]

Remarks on the Preceding Article.

2932. It may be observed on this article, that some interpreters have been of opinion, that, in the case where brothers born of the same father, and of a different mother, concur with the brothers by the mother's side alone, these ought to inherit the goods of their brother which he had by his mother, and those other brothers to inherit the goods he had from his father, and that they should divide only among them the goods which their deceased brother had acquired some other way. This opinion is grounded on this, that Justinian had made a law before this 118th novel, by which he had ordained, that in the succession of any person, who, dying without children, should leave behind him a father, together with brothers, the father in this case should have the property of no part of the goods, but only the usufruct thereof; and that the brothers should have the property; and that if the deceased had goods which he had inherited from his mother, the brothers by the same mother with the deceased should be preferred in those goods to the other brothers.[a] It is this law which seems to have given rise to the rule in the customs of France, which transmits the goods to the families from whence they came; and which appropriates the paternal goods to the relations by the father's side, and the maternal goods to those on the mother's side, *paterna paternis, materna maternis*, which has been extended to all the degrees in the collateral line. But other interpreters have thought that Justinian had abolished this distinction between paternal and ma-

[e] *Nov.* 118, *c.* 3. [f] *Nov.* 118, *c.* 3. [a] *L.* 13, § 2, *Cod. de legit. hæred.*

ternal goods by the 118th novel, and that he had abrogated that law which had established it; having made no mention of the distinction of goods in his 118th novel, no more than in his 84th novel, where, in regulating a succession between brothers by the same father and mother, and brothers by the father's side alone, and brothers by the mother's side alone, he prefers the brothers by the same father and mother, and makes no distinction of these two sorts of goods, although the occasion did require it. Here he had an opportunity of explaining his mind in this matter, whether his intention had been to abolish this distinction, or, without abolishing it, to leave to the brothers by the father's side the paternal goods, and to those by the mother's side the maternal goods, and to give the preference to the brothers by the same father and mother only in the other kinds of goods. One word added to these two novels, or at least to the 118th novel, would have removed this difficulty; but since this novel excludes indifferently the brothers by the father's side alone, or by the mother's side alone, from the succession of their brothers, when there are brothers both by the same father and by the same mother, they seem to be thereby excluded equally from all sorts of goods. And it is probably in this sense that this novel has been understood in one of the provinces in France which are governed by the written law. Seeing they have there derogated from it by a contrary rule, which directs that the brothers of the half blood, whether it be by the father alone, or by the mother alone, should succeed with the brothers of the whole blood to the goods which came from their stock.[b]

VI.

2933. *The Children of Brothers of the Half Blood represent their Fathers.*—As the children of brothers of the whole blood concur with their uncles, who were likewise brothers to the deceased by the whole blood; so the children of brothers of the half blood concur likewise with their uncles of the same quality, when the said uncles succeed to their brother, uncle to the said children; and every one of them representing their father, they take among them all the portion that he would have had if he had been alive.[g]

[b] See the sixty-fifth article of the fifth chapter of the *Customs of Bourdeaux*, and *Country of Guienne.*

[g] *Nov.* 118, *c.* 3.

VII.

2934. *The Right of Representation is limited to Brothers' Children.* — The right of representation, which puts children in the place of their deceased fathers, that they may succeed in the same manner as their fathers would have done if they had been alive, is limited to the children of brothers, and is not extended to the children of other collaterals, who succeed all by the head, according to their number of persons and degree of proximity, the nearest always excluding the remotest. Thus, when the deceased has no brothers, but only uncles, and children of another uncle deceased, the children of the deceased uncle are excluded by the uncles that are alive.[h]

VIII.

2935. *The Nephew is preferred to the Uncle, although in the same Degree.* — If the deceased left behind him neither descendants nor ascendants, nor brothers, nor sisters, but only an uncle and a nephew, the nephew would succeed to him, and exclude the uncle. For although they are both of them in the same degree of proximity, yet the nephew has the right of representation of his father, brother to the deceased, who would be preferred before the uncle;[i] and the uncle on his part has no manner of right of representation, according to the rule explained in the foregoing article.

Remarks on the Preceding Article.

2936. Some interpreters have been of opinion, that the rule explained in this article ought only to be understood of the cases where there are brothers to the deceased who are living and exclude the uncle; but that when there are only uncles and nephews, without brothers to the deceased, they ought to succeed together; and the succession is so regulated by the customs of some places. But there are many considerations which seem to require that the nephews to the deceased should be preferred to his uncles, even in the case where the deceased has no brothers alive. For besides the reason taken notice of in the article, that it is only the children of brothers that have the right of representation, as has been mentioned in the preceding article, and that the uncles do not represent their father, grandfather to the deceased, if we examine the words of the text quoted on this article, they bear so naturally the sense of giving always the preference to the nephews of the de-

[h] *Nov.* 118, *c.* 3.

[i] *Nov.* 118, *c.* 3.

ceased before his uncles, that they do not seem to be capable of having any other construction put upon them. For, first, it is there said that the nephews are considered as being in the same degree with their fathers, by the right of representation. Thus, the law gives them a rank which precedes that of the uncles of the deceased. And, in the second place, it is there said expressly, that the nephews of the deceased are preferred before their uncles; which would not be true if the uncles might succeed together with the nephews, and were only excluded by the brothers.

2937. Might we add to these reasons, that it is natural that inheritances should descend rather than ascend? And that thus, the nephews being in the rank of descendants, they ought to be preferred to the uncles, who are in the rank of ascendants. But this argument would prove too much, if we should extend it to the collaterals who are in a remoter degree than the uncles and the nephews; for, as shall be shown in the following article, the 118th novel calls to the succession all the collaterals without distinction, except brothers and brothers' childen, according to their degrees; the nearest always excluding the remotest; and those who are in the same degree concurring together, without any distinction of the lines which are below that of the brothers, and of those which are above it, and without any representation.

2938. But if we suppose that the nephews, children of the brother of the deceased, are children only of a brother of the half blood, ought they to be preferred to the uncle of the deceased? It would seem that the same reasons which give the preference to the children of brothers of the whole blood give it likewise to the children of brothers of the half blood. For besides that the double tie is only considered among brothers, and that among all the other collaterals the proximity alone distinguishes their ranks, according to the rule of the following article, the children of brothers of the half blood representing their fathers, who would exclude the uncles of the deceased, they have the same right which their fathers would have had if they had been alive.

2939. We ought not to omit adding here a remark concerning another case which falls out very often, and in relation to which some interpreters have started a question. It is the case where an inheritance being to be divided among the children of brothers to the deceased, he having no brothers alive, and the said children being in an unequal number, three, for example, of one brother, and four of another, whether those children of the brothers ought

to succeed by the head, according to their number, or by representation, the children of each brother taking the share which their father would have had. Before the 118th novel of Justinian, this question was decided by the 2d law, § 2, *D. de suis et legit. hæred.*, which provided that the children of brothers should succeed by the head, according to their number. *Hæc hæreditas proximo agnato, id est, ei quem nemo antecedit, deferìur: et si plures sint ejusdem gradûs, omnibus in capita scilicet. Ut puta, duos fratres habui, vel duos patruos; unus ex his unum filium, alius duos reliquit: hæreditas mea in tres partes dividitur.* It is true, that this 118th novel has given to the children of brothers the right of representation, which has occasioned some to fancy, that in this case the children of brothers deceased ought likewise to have this right. But the benefit of the representation given to the children of brothers by this novel is only to make them concur with their uncles, brothers to the deceased, to take the portion that their father would have had if he had been alive. And the motive of this law is not to distinguish the condition of the children of brothers among themselves, when there are no brothers to the deceased, and to make the nephews to the deceased by several brothers share unequally, according as the children of one of the brothers shall happen to be in a greater number than the children of another; so that this motive of the representation ceases among them when they succeed all alone, and without brothers to the deceased. And they succeed them only according to their proximity, which being equal makes them succeed by the head. And it is in this manner that their succession is regulated by the laws of the Visigoths, which are for the most part taken from the Roman law: — *Qui moritur, si fratres aut sorores non reliquerit, et filios fratrum et sororum reliquerit; si ex uno fratre sit unus filius, et ex alio fratre vel sorore forsitan plures, omnem hæreditatem defuncti capiant; et æqualiter per capita dividant portiones. Lib.* 4, *legis Wisigotorum, tit.* 2, *capitul.* 8.

IX.

2940. *All the other Collaterals succeed according to their Proximity.* — After brothers and the children of brothers, all the other collaterals succeed according to their degrees of proximity, without any other distinction, the nearest excluding always the remotest. And if there happen to be several in the same degree, they succeed equally by the head, and according to their number.[1]

[1] *Nov.* 118, *c.* 3.

SECTION III.

OF THE SUCCESSION OF THE HUSBAND TO THE WIFE, AND OF THE WIFE TO THE HUSBAND.

2941. It is not necessary to repeat here what has been said concerning this kind of succession in the preface to this second part, no. 2, and in the preamble of this second book, where the reader may see the reason which has obliged us to set down this rule.

Art. I.

2942. *How the Husband succeeds to the Wife, and the Wife to the Husband.* — The husband succeeds to his wife, and the wife to her husband, if either of them die without children, without relations, and without a will; and the survivor will exclude the exchequer.[a]

TITLE IV.

OF THE COLLATION OF GOODS.

2943. When there are children, or other descendants that succeed to their father, mother, or other ascendants, whether by testament or by law, when the person dies intestate,[a] they ought reciprocally to bring in that which they had received out of the estate of the person to whom they succeed; that is to say, to join it to the mass of the goods of the succession, and to divide it among them with the other goods, according as they may be obliged to this collation by the rules which shall be explained in this title.

2944. The first use that was made in the Roman law of the collation of goods, and which was the origin of it, was a consequence of the ancient law, which excluded the children that were emancipated from the succession of their fathers, when there were children that were not emancipated. For when afterwards the eman-

[a] *L. un. C. unde vir. et uxor.; — l. un. D. eod.*

[a] See the tenth article of the third section of this title.

cipated children were permitted to share in the succession, they were obliged to bring into the mass of the inheritance, that was to be divided in common among them and their brothers who had remained still under their father's power and authority, that which the emancipated children had acquired from the time of their emancipation. Because, as has been remarked in other places, that which the emancipated son acquired after his emancipation did belong wholly to himself; whereas all that the son who was not emancipated acquired on his part belonged wholly to his father, except only that which was reckoned as a peculiar patrimony, of which we have spoken in its proper place.[b] Thus there were two considerations that favored this law of the collation of goods; one was, because the emancipated son succeeding to his father reaped the benefit of whatever his brother that was not emancipated had acquired. And the other was, because that although the son who was not emancipated had made no acquisitions, yet it was by favor that the emancipated son shared in the succession with him, and therefore it was but just that the succession should be augmented with what he had acquired only by the benefit of his emancipation.

2945. In process of time, all the children without distinction, whether they were emancipated or not, having been allowed to enjoy the absolute property in whatever they acquired, as has been remarked in the preamble of the second section of the second title of this book, this first kind of collation ceased.[c] And the use of the collation was reduced to the goods which the children, whether they were emancipated or not, had acquired by the liberality of the ascendant to whom they were to succeed, together with the other children who had not received the like bounties from the said ascendant.

2946. It is of this kind of collation that we are to treat under this title. And as this matter takes in that which concerns the nature of the collation, the persons who are obliged to it, together with the persons to whom the collation is to be made, and the goods that are subject to it, these three parts shall be the subject matter of three sections.

[b] See the fifth article of the second section of *Persons*, the beginning of the preamble to the second section of the second title of this second book, and the third article of the third section of this title.

[c] *V. l. ult. C. de collat.*

SECTION I.

OF THE NATURE OF THE COLLATION OF GOODS.

ART. I.

2947. *Definition of Collation.* — The collation of goods is the engagement of the children, and other descendants, to bring into the mass of the inheritance of their father, mother, or other ascendant to whom they are desirous to succeed, the things which had been given them by the said ascendant, that they may be divided between them and their coheirs, in the same manner as the other goods of the succession. And the equity of this collation is very evident,[a] the same being founded on the natural equality among the children in the succession of their ascendants, and upon the presumption that such a gift was made only by way of advancement to the donee of a part of that which he might expect out of the succession.

II.

2948. *What ought to be restored does not properly come under the Name of Collation.* — It follows, from the rule explained in the foregoing article, that the collation being only to be understood of something which did already belong to the heir who is obliged to make the collation, we ought not to include in this matter of the collation of goods that which is a part of the inheritance, and which one of the heirs possesses by some other title; as if he was depositary of a thing which the deceased had deposited in his hands, or debtor for a sum of money which the deceased had lent him, or that he was by some other means in possession of some of the goods of the inheritance. For this heir would be bound to make restitution of these kinds of things upon another score than that of collation. Neither must we reckon among the things subject to the collation treated of here a sum of money which a testator, who leaves by his will to one of his children a certain estate in land, or some office, obliges him to pay in to the other children, in consideration of the said advantage.[b]

[a] *L.* 1, *D. de coll. bon.* We do not put down here the rest of this text, the same not being in use with us. But these first words may be applied in general to all the cases where the collation ought to take place. See the seventh and following articles of the third section.

[b] Since the collation is understood only of the things which had been given to the

III.

2949. *All the Children are obliged to this Collation, without Distinction.* — The engagement of the heir of an ascendant that is obliged to this collation towards the other heirs of the same ascendant, being founded upon the motives explained in the first article, which agree equally to the children of both sexes, to the children that are emancipated and to those who are not, to the children and grandchildren of all degrees; this engagement is common without distinction to all these sorts of children and descendants, for all the things that may be subject to the collation, according to the rules which shall be explained in the third section.[c]

IV.

2950. *The Collation is regulated by the Law, or by some Act of the Testator or Donee.* — The collation of goods among coheirs is made in two cases, and differently. One is the case where the ascendant, to whom his children or other descendants are to succeed, has directed nothing touching the collation of the goods which he has given to one of the children; which would be no hindrance why the said donee should not be obliged to the collation by the bare effect of the preceding rules, and of those which shall be explained in the third section; and this collation is founded on equity, and on the law which has established it. The other is the case of a collation ordained by some disposition of the donor, such as the donation itself, or a testament, which has regulated the conditions thereof.[d]

V.

2951. *How these Two Sorts of Collations are regulated.* — If the person to whom two or more heirs are to succeed has made some disposition for regulating the collations which they shall make among themselves, the said disposition will be instead of a law, according to the rules which shall be explained in their place.[e] And if the deceased has ordered nothing concerning the collations among his heirs, they shall have for rules those that are explained in this title.

children by the ascendants to whom they succeed, it is only improperly that we can give the name of collation to the restitutions which are spoken of in this article.

[c] *L.* 17, *C. de collat.* Although this text makes mention only of the collation in the succession of intestates, yet it takes place likewise in the testamentary successions. See the tenth article of the third section.

[d] See the eleventh article of the third section.

[e] See the seventh article of the first section of the first title of the third book.

VI.

2952. *Collation of the Revenues.* — The heir who is bound to bring in to his coheirs that which had been given him, ought likewise to bring in the fruits or other revenues thereof, according to the nature of the goods, such as the interest, if it is money, the said revenues to be counted from the time that the succession was open.[f]

VII.

2953. *He who is bound to collate recovers the Expenses laid out upon the Goods subject to the Collation.* — If for the preservation of the thing subject to collation, or for other necessary causes, the heir who ought to bring it in has been at any charges, he shall recover the value of them, or retain the thing; as if he has laid out any thing on the necessary repairs of a house, or if he has carried on a lawsuit for the recovery of a debt, or of some right. For these sorts of expenses diminishing the goods, the collation of them is likewise diminished in so much.[g]

VIII.

2954. *The Heir must either bring in what he has received, or take less for his Share.* — The heir who is bound to bring in what he has received by advancement may satisfy that obligation in two manners. One is by bringing in actually the thing that is subject to the collation, that it may be included in the mass of the goods, in order to be divided with the rest. And the other way is by retaining that which he ought to bring into the mass, and taking so much less out of the rest of the goods. These are the two

[f] *L.* 5, § 1, *D. de dot. collat.* Although this text speaks only of the dowry, yet the reason is the same for all collations. And although it be said here that the interest is due by him who delays to bring in what he is bound to do, and that it may be doubted whether the interest be due before the demand, yet it is but just that it should run from the moment that the succession to which the collation is to be made is open; and as the other goods of the succession, and the revenues which they produce, are reckoned in the partition from that time, so the goods subject to the collation are of the same kind, and are a part of the inheritance, and therefore the fruits and produce thereof are due as well as the other goods. This is regulated after this manner by some of the customs, and is a consequence of the rule explained in the sixth article of the second section of *Partitions*. And it may be likewise said, that every heir who has goods subject to collation acts an unfair and dishonest part if he does not bring them in, or does not declare what goods he has of this kind.

[g] *L.* 1, § 5, *D. de dot. collat.* See the twelfth and the following articles of the third section of *Dowries*.

ways of collation which are expressed in these words, *to bring into the mass of the goods, or to take less out of it.*[h]

IX.

2955. *He who brings in the Goods subject to Collation increases the Number of the Sharers in the Partition.* — The collation is made in such a manner, that, whatever is brought in being added to the mass of the goods, the whole is divided into as many portions as there are heirs; including those who collate, and those to whom the collation is made.[i]

SECTION II.

OF THE PERSONS WHO ARE BOUND TO COLLATE, AND TO WHOM THE COLLATION OUGHT TO BE MADE.

ART. I.

2956. *There is no Collation but among Children.* — It is only the children or other descendants, heirs to their fathers, mothers, or other ascendants, who are obliged to the collation treated of in this title; because the motives of the laws which ordain this collation agree only to them.[a]

II.

2957. *He who renounces the Inheritance does not collate, unless it be for the Legitime or Child's Part of the others.* — If the children, or other descendants, who had goods subject to collation, abstain from the inheritance, the collation ceases. And as they take no share in the other goods of the inheritance, so neither do they give to the other children or descendants any share of the goods which they had acquired before the succession was open.[b]

[h] *L.* 1, § 12, *D. de coll. bon.*; — *l.* 5, *C. eod.*; — *Nov.* 97, *c.* 6.

[i] *L.* 1, *in f. D. de coll. bon.*

[a] See the first and third articles of the first section, and the texts which are there cited. See the following articles.

Of the three orders of heirs, descendants, ascendants, and collaterals, it is only the first in which are to be found the motives of the right of collation explained in the preceding section. And the case of collation does never happen even among ascendants; for the descendants do not make any presents to them. And as for the collateral successions, the motives of the collation not agreeing to them, there is never any collation in them unless it be ordained by the person whose inheritance is to be divided.

[b] *L.* 25, *C. fam. erciscund.*; — *l. ult. D. de dot. collat.* This liberty of being free from

But if what remains in the succession is not sufficient for the legitime, or child's part of the other children, reckoning in the father's estate the goods that ought to have been brought in by him who abstains from the inheritance, if he had declared himself heir; in that case he would be obliged to give part of them to the others, so as to make up what they want of their legitime, or child's part.[c]

III.

2958. *To whom the Collation ought to be made.* — As the collation takes place only among children that are coheirs, so it is due only to those who have these two qualities. Thus, the children who have no share in the inheritance, whether it be that they renounce it, or that they are excluded from it by being disinherited, have likewise no share in the collation.[d]

SECTION III.

OF THINGS WHICH ARE SUBJECT TO COLLATION, AND OF THOSE WHICH ARE NOT.

ART. I.

2959. *Two Sorts of Goods of Children.* — We must distinguish two sorts of goods, which children or other descendants may have, that are to divide among them the succession of their father, mother, or other ascendant. One sort is of the goods which they had from their father, mother, or other ascendant, by some title, which the following rules make subject to collation. And the other sort is of the goods which they may have acquired any other way, by what title soever it may be; whether by the liberality of other persons besides their ascendants, or by their own industry, or by other ways.[a]

the collation upon renouncing the inheritance is generally received in France, except in some particular customs, where children who are donees in the families of those who are ignoble are obliged to bring into the mass of the inheritance whatever has been given them by the father, or mother, or other ascendants, although they renounce the succession of the donor.

[c] *L. un. C. de inoff. dot.*; — *l.* 5, *C. de inoff. donat.*

[d] This is a consequence of the first article.

[a] There can be no goods but what are contained under one or other of these two kinds.

II.

2960. *The Goods acquired otherwise than from the Ascendants are not subject to Collation.* — Whatever the children may have acquired any other way than from the goods of their ascendants, whether they have acquired it by a testamentary succession, or by succeeding to intestates, or by donation, or any liberality of other persons, or by their own industry, belongs entirely to themselves, and is not subject to collation.[b]

III.

2961. *The Peculiar Patrimonies of the Son are not subject to Collation.* — The peculiar patrimonies which have been mentioned in the third article of the second section of the second title are the proper goods of the son who is still under his father's power, which not being descended to him from his father, or other ascendant, are not subject to collation. And seeing these sorts of goods belong so absolutely to the son, that his father has not so much as the use and profits of them, it would not be just that the coheir should have any share in them.[c] But that which a son who is still under his father's authority may have gained, by his management and administration of some goods which the father had intrusted him with, belongs properly to the father, and is subject to collation.[d]

IV.

2962. *The Son does not bring in that which the Father was bound to give him.* — If a father had been required by a testament, or other disposition of any person, to give to his son a sum of money, or some other thing; that which the son possesses under this title would not be subject to be brought into the succession of his father; because it would not be to the father's bounty that the son owed this thing.[e]

V.

2963. *The Expenses of Education are not brought in.* — The children, or other descendants, succeeding to the inheritance of their father, or mother, or other ascendant, do not bring in that which has been laid out upon their studies, or in other expenses which

[b] See the first article of the second section, *In what Manner Fathers succeed.*

[c] *L.* 1, § 15, *D. de collat. bon.*; — *l. ult. C. eod.*

[d] *L.* 12, *C. de collat.* See the first and seventeenth articles of the second section of the second title.

[e] *L.* 1, § 19, *D. de collat.*

their education may have required. For these sorts of expenses are what parents are bound to lay out upon their children, and are as it were a debt which they ought to acquit.[f]

VI.

2964. *The Things given to one of the Children, as an Advantage over and above what the others have, are not subject to Collation.* — The things given to children, or other descendants, that they may have what is so given as an advantage over and above what the other children their coheirs have, are not brought into the mass of the inheritance collated, if it is evident that it was the express will of the donor, that what he gave should remain with the donee as an advantage over and above his equal share with the rest of the heirs, or that it should not be subject to collation.[g] But if, upon a computation of the thing given as an advancement to a child, together with the goods which remain in the inheritance, it should be found that the other children had not their legitime, or child's part of the whole, the donee would be obliged in this case to bring into the mass of the goods so much as to make up the legitime, or child's part, of the others, even although he should be willing to content himself with the gift, and to renounce the inheritance.[h]

VII.

2965. *Dowries and Donations in Favor of Marriage are brought into the Mass of the Goods.* — Whatever a father, mother, or other ascendants, whether they be by the father's or mother's side, of both sexes, give to their children or other descendants, on occasion of their marriages, whether it be to a son as a settlement upon him in favor of his marriage, or to a daughter for her marriage portion, or otherwise, according to the different uses of donations of this kind, is subject to collation. Thus children, sons or daughters, succeeding to the inheritance of an ascendant from whom they had received such like liberalities, ought to bring them into the mass of the goods of the inheritance.[i]

[f] *L.* 50, *D. fam. ercisc.*

[g] *Nov.* 18, *c.* 6. If there were a donation or other disposition which should contain a gift as an advantage to one child over and above what the others should have to their shares, this bare expression of giving that by way of preference or distinction to that child would make the collation to cease. For otherwise, if the child were obliged to bring it in and share it with the others, it would be no particular advantage to the said child.

[h] *Nov.* 92, *c.* 1. See the fourth and fifth articles of the third section of the *Legitime.*

[i] *L.* 17, *C. de collat.* Although this text makes mention only of the succession to in-

VIII.

2966. *Collation of the Dower when the Husband is Insolvent.* — If a daughter, having been endowed by her father, mother, or other ascendant, should come to inherit to him, and her husband, who had received and squandered away her marriage portion, should happen to be insolvent, she would nevertheless be obliged to reckon it in the mass of the goods to be divided between her and the other heirs, if by the circumstance this loss may be imputed to her; as if she had neglected to secure herself by a separation of goods, or to take other precautions for the security of her marriage portion.[l] But if nothing can be laid to her charge, as if she was a minor, and the said loss had happened through the fault of the person who had given the marriage portion, her father, for example, or her grandfather by the father's side, who, in default of the father, who was either dead, or absent, or interdicted, or in a state of madness, being obliged to endow his granddaughter, had paid the portion to the husband whose insolvency was apparent, or at least much to be feared, she might be discharged from this collation, according to the circumstances, by bringing in only the action for the restitution of the marriage portion, against the husband or his heirs.[m] But if it was the grandfather by the mother's side, or other ascendant, who, not being under any obligation to endow the young woman, had given her a sum of money for her portion out of mere liberality, she being either of age, or under the tuition of her father, mother, or of a tutor, the loss of this portion, although the donor had paid it to the husband when insolvent, would not free her from the obligation of accounting for it to her coheirs, if she would succeed as heir to the donor who gave her the said portion. For this loss would be a casualty which could not be imputed either to the donor or to his heirs.

testates, yet it is the same thing in testamentary successions. Must we comprehend under liberalities in favor of marriage which are subject to collation, that which a father, a mother, or other ascendant, makes a present of to his son, or his daughter-in-law, to his daughter, or his son-in-law, such as is mentioned in this law, the expenses of the wedding, the wedding clothes, the wife's paraphernalia, or other presents according to custom? There are some customs in France which direct these sorts of presents to be brought in, and others which exempt them from the collation. Thus we ought to judge of this matter according to the usage of the place, if there is any, or according to the circumstances of the quality of the persons, of the nature of the presents, and of their value.

[l] *Nov.* 97, *c.* 6.

[m] *D. c.* 6, § 1. We have endeavoured to form this article upon such part of the text as agrees with our usage.

IX.

2967. *All other Donations are brought into the Mass of the Inheritance.* — Besides the donations in favor of marriage, and the marriage portions of daughters, all other donations made by a father, mother, or other ascendant, to a son, or a daughter, or other descendant, married or unmarried, ought to be brought into the succession, whether the deceased made a testament or died intestate, unless the donee has been discharged from the collation by the donor, as has been said in the sixth article. And although the collation be not enjoined by the testament, when there is one, yet the donee is nevertheless obliged to it.[n]

X.

2968. *Whatever may be reckoned as a Part of the Legitime, or Child's Part, ought be brought in.* — All that the children and other descendants have received from their father, mother, or other ascendants, which might be reckoned to them as part of their legitime, or child's part, is subject to collation. Thus, the moneys which have been laid out on the purchase of some office for one of the children, and other such like liberalities, ought to be brought into the mass of the inheritance. For otherwise these bounties would be advantages which would destroy the equality among the children.[o]

XI.

2969. *The Collation is due, whether the Deceased left behind him a Testament, or died Intestate.* — As the collation which the children and other descendants who succeed to their father, mother, or other ascendants, owe reciprocally to one another, is equally due, whether the ascendant to whom they succeed has enjoined it by some disposition, or whether he has given no orders about it; so it is the same thing with respect to the collation, whether the donor has left behind him a testament, or died intestate; and it is likewise indifferent whether, when there is a testament, the collation is enjoined by it, or whether it makes no mention at all of it. For it is only the express will of the donor that can free

[n] *Nov.* 18, *c.* 6. See the eleventh article. *L.* 13, *C. de collat.*; — *l. penult. C. fam. ercisc.* Seeing this law speaks of donations without distinction, and exempts from the collation only him who renounces the inheritance, it follows that, on the contrary, he who does not renounce is bound to bring in all sorts of donations.

[o] *L.* 20, *C. de collat.*

the donee from bringing in the gift.[p] And if a testator has omitted to direct in his testament the collation of the donations which he had made before, the law supplies that omission, and presumes that he had forgotten the donations which are subject to collation.[q]

XII.

2970. *The Daughter brings into the Succession of the Father the Portion given her by the Grandfather on the Father's Side.* — If the grandfather by the father's side had endowed his granddaughter, the father being alive, and after the death of this grandfather the father who had survived him had left together with this daughter other children, or grandchildren, who were to succeed to him as his heirs, she would be obliged to bring into the inheritance of her father the portion which the grandfather had given her. For seeing it was the duty of the father to endow his daughter, it was for him that the grandfather gave her her marriage portion. So that it was the same thing as if the father had given the portion out of his own estate. Which makes the said portion to be subject to collation, that the other children, who are heirs to their father, may have a share in it.[r]

Remarks on the Preceding Article.

2971. Although the law cited speaks only of the right of reversion of this marriage portion in favor of the father, yet we have thought proper to draw from thence the rule explained in this article for the collation, and that upon two considerations. One is, that this law, being placed under the title of collation, we may conclude from thence that it has been put there with this view, that the collation is due in this case. The other is, that the same equity which makes us to consider the marriage portion given by the grandfather as if it were given by the father, in order to give to the father the right of reversion of this portion, as having proceeded from himself, demands likewise that the same portion should be brought into the father's inheritance, since we ought to look upon it as having proceeded from the father, and that if he had survived her, the reversion of this portion would have augmented his succession. And besides, seeing this daughter finds in her father's succession that of her grandfather, it is just likewise, for this reason, that this portion should be brought into it. Thus,

[p] *Nov.* 18, *c.* 6. [q] *Nov.* 18, *c.* 6. [r] *L.* 6, *D. de collat.*

as we have put down the rule drawn from this law for the right of reversion among the other rules of this matter,[a] the same reason has induced us to set down here such another rule for the right of collation.

2972. It seems to follow from the rule explained in this article, that if a grandfather had made any present to his grandchildren, their father being alive, who afterwards succeeded to the grandfather, he ought to bring into the grandfather's succession the presents which had been made to his children. And it is so regulated by the customs of some places, which have likewise directed that the grandson succeeding to his grandfather by representation of his deceased father should bring into the mass of the goods that which the said grandfather had given to his father. Which is founded upon this, that, as this son succeeds to the grandfather in the place of his father, it is but just that he should bring in what his father would have been obliged to do if he had succeeded; and, in general, it is equitable in all cases that the equality which is the foundation of the right of collation should be observed among all the descendants who are to share the successions of their ascendants.[b]

XIII.

2973. *The Things which have perished without the Fault of the Donee are not brought in.* — If the things that were given had perished without the fault of the donee, whether it be after or before the succession was open, he would not be bound to bring in their value. For whatever perishes in such a manner that the loss thereof cannot be imputed to the act of any person, the loss falls upon the owner of it, and upon all those who have any right in it.[c] And as to the profits which the donee may have reaped from the things which were given him, those which he had made before the succession was open belonged entirely to himself, and were no part of the inheritance. But if the thing did not perish till after the succession was open, then the profits which had been made after the succession was open would be considered as a part of the succession, and subject to collation. And, in general, the children that are coheirs to their ascendants ought to bring into the mass of the inheritance reciprocally, for the benefit of one another, all

[a] See the sixth article of the third section of the second title of this second book.
[b] See the close of the following article.
[c] *L.* 2, § 2, *D. de collat.*

that reason and equity can demand for making their condition as equal as is possible.[t]

XIV.

2974. *What is consumed by Use ought to be brought in.* — We must not comprehend in the number of things perished, which have been mentioned in the foregoing article, those which perish by casualties, such as a house by fire, a land or tenement carried away by a flood or inundation, movables taken away by robbery. But we ought not to place in this rank the things which perish by their own nature, such as cattle; or those which are consumed by their use, such as money, corn, liquor. For although these things are not in being when the case of their collation happens, yet the donee is nevertheless bound to bring in their value, because the delivery which had been made of them to him had given him all the use that could be made of them.[u]

General Remark.

2975. It is not proper to enlarge here on the several questions which may arise from this matter of collation; for besides that these questions are not contained in the laws, they are not within the design of this book. It suffices here to lay down the principles on which the decisions of those questions which have not their proper rules in the customs do depend. And whereas the variety of questions would only serve to confound and perplex the reader, the bare view of the principles, rightly understood, gives all the light that is necessary for all sorts of difficulties.

[t] *D.* § 2. See the sixth article of the first section.

[u] This is a consequence of the nature of those sorts of things.

BOOK III.

OF TESTAMENTARY SUCCESSIONS.

2976. The general reflections which might be made here on the subject-matter of testamentary successions, before we enter on the particular detail thereof, having been necessary, and more properly set down, in another place, it is not proper to repeat any of them here; and it is sufficient to advertise the reader, that he may see on this subject what has been said of it in the foregoing preface.[a]

2977. Neither is it proper to repeat here what has been said in the preamble of the second book, to give an account why we have thought it fitting to treat of the succession to intestates before the testamentary successions, although these are explained in the first place in the Roman law.

TITLE I.

OF TESTAMENTS.

2978. In the Roman law, and in the provinces of France which are governed by the written law, the name of testament in the proper signification of it, is applied only to dispositions which contain the institution and appointment of an heir or executor; and all the other dispositions, in which there is no heir or executor named, are called *codicils*, or *donations made in prospect of death.*

2979. According to this distinction of testaments and codicils, or donations in prospect of death, there ought to be no testaments

[a] See the said preface, no. 5, and the following.

at all in the provinces which are governed by their customs, but only codicils, or donations in prospect of death; because in the customs there can be no other heirs but those of blood, and they give only the name of universal legatees to the persons who succeed to all the goods which one has power to dispose of by will. But, nevertheless, they do give the name of testaments to dispositions made in view of death, which contain only particular legacies; and with much more reason may we give the name of testaments to the dispositions which name universal legatees, seeing they are bound for the charges in proportion to the share which they have of the goods, in the same manner as if they were heirs or executors, and that they may even have all the goods in the customs where the testator is at liberty to dispose of all his acquests, and of all his movables, if the testator were a person whose estate consisted wholly of goods of these two kinds, and who had no estate of inheritance which came to him by descent from his ancestors.

2980. We make here this remark, to advertise the reader that we shall, in the sequel of this work, use the word *testament* both in the one and the other of these two senses, which comprehend all the dispositions that are made in view of death; but we shall do it in such a manner, that it will be easy to distinguish in each place whether it ought to be understood either barely of dispositions which contain the institution of an executor, or only of the others.

2981. We have not inserted in this title that rule of the Roman law, that the power of making a testament is part of the public law.[a] For, besides that in all the customs it is on the contrary received as the universal, and as it were public law, that no one can make a testament, that is, an institution of an heir or executor; we ascribe, properly speaking, this character of public law only to what relates to matters in which the public has an interest, such as matters belonging to the exchequer, matters criminal, and others of the like nature.[b] And although it be true, that, the power of making a testament being established and regulated by the laws which make one of the principal parts of the universal order of human society, it may be said in this sense, that the power of making a testament is part of the public law; yet the

[a] *L.* 3, *D. qui test. fac. poss.*

[b] See the fourteenth chapter of the *Treatise of Laws*, no. 27.

nature of testaments is not thereby distinguished from that of many other matters, which are as much or more necessary in this order of society than testaments; such as several sorts of covenants, guardianships, and others, the use of which is established and regulated by the laws. Thus, testaments are no more a part of the public law than guardianships and other matters; unless that any one should think that it might be said that testaments were in another sense part of the public law under the Roman law, because at first people were allowed to make their testaments in the public assemblies.[c] But it does not seem as if this were the reason why it is said in the Roman law, that testaments are part of the public law, because there were other ways of making one's testament in private, even whilst that other way was in use.

SECTION I.

OF THE NATURE OF TESTAMENTS, AND THEIR KINDS.

2982. *Testaments wholly written with the Testator's Hand.* — It is fit to acquaint the reader, that he will find nothing in this section concerning that kind of testaments which are called holograph, that is, entirely written and signed with the testator's hand, without any witnesses. For although they have been approved by a novel of Theodosius and Valentinian,[a] and though the proof of the testator's will may be fully as authentic, or rather more, by this writing, than by his declaration before witnesses; yet since the testaments written with the testator's own hand, without witnesses, are not of universal usage, and are not received in the Roman law but with the testimony of seven witnesses, the testator being dispensed with there only from signing it with his own hand,[b] we have not thought proper to set down here a rule concerning the use of these testaments without witnesses, contrary to the express provisions of the Roman law received in many places.

2983. *Testaments of poor Country People.* — Neither shall we make any mention in this section of the testaments of poor country people, which are called *testamenta rusticorum*, in which the

[c] § 1, *Inst. de test. ord.*
[b] *L.* 28, § 1, *C. de testam.*
[a] *Nov.* 2, § 1, *de testam.*

laws dispense with the exact observance of the formalities, as appears by the last law, *Cod. de testam.* For as the privilege which that law gives for these sorts of testaments is only to dispense with the number of seven witnesses, in the places where so many persons cannot be found who know how to write their names, and to make the number of five witnesses sufficient in this case; so this privilege seems altogether useless, according to our usage in France, which requires the presence of a public notary with witnesses, and where it is not necessary that the witnesses be persons who can write. But there is seldom want of such witnesses in a place where there are public notaries.

2984. *Testaments among Children.* — There is likewise another kind of testaments, which we have thought fit to leave out in this section, which is that of testaments among children, that is to say, dispositions which a father makes among his children, whether by way of testament, or by way of partition. This kind of testaments is distinguished from all the others for this reason, because such wills were so favorable in the Roman law, that, in whatever manner a father explained his intention of dividing his estate among his children; whether by a testament begun and not finished, *sive cœptum, neque impletum testamentum,* or by a letter, *sive per epistolam,* or by any other writing whatsoever, *sive quocunque alio modo scripturæ, quibuscunque verbis vel indiciis inveniantur relictæ;* this will, although ever so imperfect and void of form, was nevertheless to be executed.[c] This seems to proceed from the same spirit of the Roman law, which gave fathers such an absolute authority over their children, that at first they had power to disinherit them without any cause, as has been observed in another place.[d] This license given to fathers, in making their wills among their children, does not seem to be founded on the favor of the children's interest, since, on the contrary, it is the common interest of the children that their fathers should preserve the natural equality among them. Thus, the consideration of the children is not a motive that renders the wills of parents favorable, when they give greater advantages to some of their children than to the others. And if this favor of the children were to be considered in the difficulties that arise concerning wills made by fathers among their children, it would help rather to annul them, if they are de-

[c] *V. ll.* 16, 21, *et l. ult. C. fam. ercisc.*; —*l.* 21, § 1, *C. de testam.*

[d] See the preface to this second part, no. 7.

fective in point of form, than to supply the want of formalities, in order to make them valid, when they destroy that equality which is to preserve union among brothers.

2985. This excessive license in the imperfect wills of fathers among their children was restrained by Justinian, who by his 18th novel, c. 7, ordains that they should be signed either by the father, or by the children. And by his 107th novel he added that the father should write with his own hand the date and the names of his children; and that he should likewise set down with his own hand, at length, and not in numbers or ciphers, the portions which he should regulate for every one. But although it seems that all these precautions ought to suffice to make these testaments valid, even without witnesses; yet many interpreters have been of opinion that none of these laws dispense with the necessity of witnesses. And he that is reckoned the most able of the said interpreters, being consulted in a question concerning the validity of a father's testament among his children, was of opinion, that the number of witnesses was necessary; and that all testaments of fathers among their children, without this formality, were null; and gives particular answers to all the laws above mentioned, to show that none of them dispense with this formality.

2986. It is upon these considerations, that although the use of these testaments or partitions among children is received in some provinces, and that they are there approved of, although they want the formalities, yet, seeing this is not a universal usage, we have not thought proper to lay it down here as a general rule, that the imperfect and unformed will of a father among his children ought to subsist: for this would be a law too uncertain and undetermined, since it would leave fathers at liberty to dispense with all sorts of formalities in their testaments, so as that there could be no testament so imperfect, but what would be made valid in this manner, if we should give to the words of these laws the indefinite extent which they seem to have, and which does noways agree with the character of plainness and clearness that is necessary to make rules certain and fixed as they ought to be. So that it is to be wished that there were, in relation to this matter, some fixed rules, which might either subject these testaments to the formalities of others, or regulate the formalities that cannot be dispensed with in them; as has been done in the customs of some provinces, which have regulated the formalities of partitions made by fathers among their children. In some cus-

toms these partitions are not received, unless the children have consented to them. Others require in such partitions the presence of a public notary, and two witnesses, as in all other testaments; it having been judged necessary, that an act so serious, and of such importance, as a testament among children, should be made with as much application and exactness as a testament which calls strangers to be heirs or executors; but especially when a father will make unequal partitions among his children, and when there is less inconvenience in favoring the equality among children, and in requiring in the wills of fathers formalities that are easy, than in approving without distinction the imperfect and undigested wills of parents, which perhaps are only rude draughts of what they project in their imaginations, without coming to a final resolution therein, and which give occasion of strife and contention among the children.

ARTICLE I.

2987. *Definition of a Testament.* — A testament is an institution or appointment of an heir or executor, made according to the formalities prescribed by law; whether that together with the said institution there be any other disposition, or that there be nothing in it besides the bare institution.[a]

[a] Quinque verbis potest (quis) facere testamentum; ut dicat Lucius Titius mihi hæres esto. *L.* 1, § 3, *D. de hæred. inst.*

Testamentum est voluntatis nostræ justa sententia de eo quod quis post mortem suam fieri velit. *L.* 1, *D. qui test. fac. poss.*

It follows from the first of these texts, that the essential part of a testament is the institution of an heir or executor, seeing these words, *I will that such a one be my heir or executor*, make a testament.

The interpreters are divided among themselves upon this question, whether the definition of a testament, as it is set down in the second text here quoted, be so just and exact as a definition ought to be. And many, even of those of the greatest learning among them, undertake the defence of it against those who say it is not exact. As to which we may say, that if the authors of the laws have not always in their definitions and in their expressions that justness and exactness which logicians and mathematicians have, it is but just that that defect should be supplied, in order to give to the laws the natural sense which one clearly sees their intention does demand. But seeing we endeavour in this book to render every thing intelligible to every reader, and to observe throughout the whole, as much as we are able, that exactness; we have judged that, in order to give the just idea of a testament, and such as may distinguish it from other dispositions made in prospect of death, we ought to form the definition of a testament in the manner in which it is conceived in this article. For whereas the other dispositions are only of a part of the goods, it is essential to the testament that there be named in it an heir or executor, who is the universal successor. See the first article of the first section of *Heirs and Executors* in general.

It is to be remarked on this definition, that it does not agree with the dispositions which

II.

2988. *The bare Naming of an Executor makes a Testament.* — It follows from this definition of a testament, that it comprehends two essential characters necessary to be distinguished. One is, that it contains the disposal of all the testator's goods; and the other is, that it is a disposition made in view of death, which may be revoked.[b] We shall explain in the two following articles the effects of these two characters, and in what manner they are comprehended in the definition explained in the first article.

III.

2989. *The Testament implies the Disposal of all the Goods.* — Since it is essential to a testament that it contain the institution of an heir or executor, and that the heir or executor is universal successor of all the goods that are not particularly bequeathed, every testament implies the disposal of all the goods; whether it be that the whole is left to the heirs or executors, or that others are to have a share with them: which makes no alteration in the nature of a testament; and all the different dispositions that may happen to be in it make only one act, which contains a declaration of the testator's will, as to the disposal of all the goods which he shall happen to leave behind him.[c]

IV.

2990. *The Testament hath its Effect only by the Death of the Testator.* — The testament is a disposition made on occasion of death, that is, made in the view that the person who disposes of his goods by testament has of his own death, and with design that his disposition shall not have its effect till after his death; for it is only by this death that the heir or executor has his right. From whence it follows, that, the testament having no effect till the death of the testator, he is always at liberty to revoke it, and either to change it by making another, or to destroy it quite by suppressing it, without making another. Thus, when there happen to be several testaments of one and the same person, it is always the last that ought to subsist, except in so far as this

people may make of their estates in the customs. For, as has been observed in the preamble of this title, one cannot have other heirs in the customs than the heirs of blood.

[b] This is a consequence of the definition of a testament. See the two articles which follow.

[c] This is also a consequence of the definition. See the first article of the first section of *Heirs and Executors* in general.

last testament should ratify and confirm the dispositions of the former.[d]

V.

2991. *The Heir of Blood is Testamentary Heir, if he is instituted.* — Although the testator name no other heir or executor, but the person who ought to succeed to him, if he died intestate; yet, if he accepts the inheritance or succession, he shall be testamentary heir, and bound in this quality to discharge the legacies, and all the other charges imposed by the testament;[e] for it is only by this title that he enjoys a succession which the testator might have left to others if he had pleased.

VI.

2992. *The Testament ought to contain the Institution of an Heir or Executor.* — Dispositions made in view of death, which do not contain the institution of an heir or executor, are not properly testaments, but codicils or donations because of death.[f]

VII.

2993. *The Will of the Testator is in Place of a Law.* — It follows from the liberty which the laws give to persons to dispose of their effects by a testament, that all the wills of a testator, whether it be in what relates to the appointment of an heir or executor, or the other particular dispositions which he may have made, are in the place of laws both to the executor, if he accepts of the succession, and also to the legatees, if they accept their legacies;[g] but this is to be understood with this reverse, that the testator has ordained nothing contrary to law or good manners.[h] For with

[d] De eo quod quis post mortem suam fieri velit. *L.* 1, *D. qui test. fac. poss.* Prius testamentum rumpitur cum posterius rite perfectum est. *L.* 2, *D. de inj. rupt. irr. fact. test.* Ambulatoria enim est voluntas defuncti usque ad vitæ supremum exitum. *L.* 17, *D. de adim. vel transf. leg.* Although this last text does not, strictly speaking, relate to what is said in this article, yet nevertheless it may be applied to it.

See, touching the nature of dispositions because of death, what has been said of that matter in the preamble of the title of *Donations* that have their effect in the lifetime of the donor.

[e] See the seventeenth article of the fifth section, and the texts which are there quoted.

[f] § 2, *Inst. de codicill.*

[g] *L.* 120, *D. de verb. signif.*; — *Inst. de leg. Falcid.*; — *Nov.* 22, *c.* 2.

[h] *L.* 55, *D. de legat.* 1; — *l.* 13, *D. de testam.*; — *l.* 15, *D. de condit. instit.* This indefinite liberty of testators is naturally restrained within the bounds of what is not contrary to law, as is said in the article; and a testator can ordain nothing that is contrary to the disposition and spirit of any law. Thus, he cannot prohibit his heirs or executors from

respect to the testator, his dispositions have the authority of the law, which permits him to make them; and as to those who receive any benefit by a testament, their acceptance of it engages them to the charges which it may contain, in the same manner as if they had treated with the testator, he leaving to them his estate upon the conditions, and with the charges, which he has explained, and they accepting the estate with those charges; and in the same manner likewise as if they had treated with the persons to whom the testator engages them.[i]

VIII.

2994. *The Testament ought to depend on the Will of no other Person but the Testator.* — Since the dispositions of a testament have their effect by the will of the testator, which is in place of a law, it is only from this will that they have their force. And if a testator, instead of choosing and naming his heir or executor himself, had said in his testament that his will was that such a one should be his heir or executor, whom a certain person, whom he should name, should choose and call to his succession; this institution would be lame, and have no effect. For it would want the character that is essential to a testament, of containing the proper will of the testator, and not that of another person. And it would be even contrary to equity, that the choice of an heir or executor should depend on any other person than him who has the right to dispose of his estate: seeing, on one hand, the testator may be deceived by that person, who after the testator's death may abuse in several respects the confidence which he has put in him; and, on the other hand, he who should happen to be chosen heir or executor would owe this benefit less to the indefinite will of the testator, than to the choice of him who had the right to name the heir or executor.[j]

Remarks on the Preceding Article.

2995. Although we have endeavoured throughout the whole of this book to confine ourselves to the rules and remarks that seemed

making partition of his estate. Thus, he cannot direct that a substitution which he has made in his testament should not be published and enrolled. Thus, he cannot deprive his children of their legitime, or child's part.

[i] § 5, *in fin. Inst. de oblig. quæ quas. ex contr. nasc.*; — *l.* 3, *in fin. D. quibus ex caus. in poss. eatur.* See, touching the engagement of the heir or executor, the eighth article of the first section of *Heirs and Executors* in general.

[j] *L.* 32, *D. de hæred. instit.* See the twenty-fifth article of the fifth section of this title, and the remark that is there made on it.

necessary, and to abstain from every thing that is only matter of curiosity; yet we cannot forbear to remark here, that there is among the laws of Spain a rule directly contrary to that which is explained in this article. For there it is permitted to every one to name á person to whom he gives power to make his testament for him, and to dispose of his goods after his death, and to choose for him such heirs or executors as he shall think fit. And whatsoever is ordered by this person, who is commissioned to make the testament, whom they call *cometido á fazer testamento*, is observed in the same manner as if the deceased had ordained it; excepting only, that he cannot name himself heir or executor, nor disinherit the children or other descendants of that person whose testament he makes, nor substitute to them by any manner of substitution, nor name a testator to them, unless he has express power from the deceased so to do. *V. la ley* 31 *de Toro*, and the additions to the laws of Alphonso IX., part 6th, title of *Testaments*.

IX.

2996. *Two Sorts of Questions concerning Testaments: What the Testator had Power to do, and what he had a Mind to do.* — It follows from the rules explained in the foregoing articles, that there are only two sorts of questions that can arise from the dispositions of a testament, when it is made according to form, and ought to subsist. One is of those where the question is to know whether the disposition of the testator has nothing in it that is contrary to law; and the other is of those where the matter in question is to know what has been the testator's intention. For it is his intention that ought to serve as a rule, if it is not contrary to law.[m]

X.

2997. *One cannot institute an Heir or Executor, so as that his Institution shall begin, or cease to be, after a certain Time.* — Since the heir or executor, that is named in a testament, ought to be universal successor to all the goods and all the charges of the deceased, a testator cannot institute an heir or executor in terms which limit the institution, either not to take place but within a certain time after the testator's death, or to cease to have effect after a certain time which he has prescribed; so as that, in the first case, the succession should be without any heir or executor

[m] *L.* 37, *D. de cond. et dem.* See, touching the difficulties in the interpretation of testaments, the sixth section, and the others which follow.

during all that time; and that in the second case there should be no heir or executor after the time limited is expired. For it is essential to the quality of heir or executor, that he take the place of the deceased after his death; and that the succession do not remain vacant, and without a master, who may prosecute the rights and acquit the charges of it. But although this disposition should have no effect, yet the testament which contains it would not be null for this single defect, and the heir or executor would be reputed such from the time of the testator's death, and for all the time to come, as much as if the institution had not been limited in this manner.[n]

XI.

2998. *The Testament hath its Effect by the Acceptance of the Heir or Executor.* — Although the nature of the testament, and its validity, consists in this, that it contains the will of the testator, and that it is by this will that it ought to have its effect; yet it hath its effect only when the heir or executor, accepting of this quality, engages himself thereby to all the dispositions of the testator, and to all the charges of the inheritance.[o]

XII.

2999. *Divers Kinds of Testaments.* — There are testaments of divers kinds, and which are distinguished, not by that which is essential to their nature, which is the institution of an heir or executor, common to all testaments, but by the different formalities which the laws have established for the use of persons who have a mind to dispose of their estates, according as these formalities may agree either to the quality of the person or to the circumstances

[n] Hæreditas ex die, vel ad diem, non recte datur: sed vitio temporis sublato, manet institutio. *L.* 34, *D. de hæred. inst.* It is not the same thing with respect to bare legacies and legacies in trust, which may begin to be due, or cease, at a certain day. For in this there is no manner of inconvenience; the right to the thing bequeathed remaining with the heir or executor, whilst the legatee has it not, and reverting to him when the legatee ceases to have it.

This rule is not contrary to that other which permits the testator to charge an heir or executor to deliver over the succession after a certain time to another person, who succeeds in his place by a fiduciary bequest, which we shall treat of in its proper place. For the succession does not by this means remain vacant; and besides, this heir or executor who restores the inheritance continues nevertheless to be heir or executor, and to be bound for the charges, against which the successor ought to indemnify him. See the eighth article of the first section of *Substitutions*.

[o] *L.* 55, § 2, *ad senat. Trebell.* See the eighth article.

of the condition in which he is, as will appear by the following articles.[p]

XIII.

3000. *Testaments of those who are Blind, Deaf, or Dumb.* — As to what concerns the persons of the testators, we may make one prime distinction of testaments which may be made by those whom some infirmities render incapable of certain ways in which others may make their testaments. Thus, persons who are blind, deaf, or dumb can make their testaments only with such formalities as they are capable of, as shall be explained in the following section.[q]

XIV.

3001. *Military Testaments.* — The same consideration of the difference in testators furnishes us with another distinction of testaments that are made by officers in the army, and soldiers that are actually engaged in their military functions, and taken up in such a manner that it were not possible for them to observe the formalities which the law prescribes in testaments. For the law dispenses with these formalities in persons who are in this condition, that it is impossible for them to observe them, and facilitates their dispositions, as shall be explained in the third section.[r]

XV.

3002. *Testaments in Time of a Plague.* — The same consideration of the conjunctures in which testators cannot observe the formalities necessary to a testament has induced the lawgivers to relieve those that are obliged to make their testaments in a time of plague from observing therein rigorously all the formalities which they have prescribed. We shall explain in the third section the temperament which they allow of whenever this case happens.[s]

XVI.

3003. *Secret Testaments.* — Seeing a testator may reasonably wish that his will may be kept secret till after his death, he may

[p] See the following articles.

[q] See the seventh, eighth, ninth, tenth, and eleventh articles of the following section, and the remarks on them.

[r] See the fifteenth article of the third section.

[s] See the sixteenth article of the third section.

make a private and secret testament, in the manner that shall be explained in the third section.[t]

XVII.

3004. *Several Originals of one and the same Testament.* — In what manner soever a testament is made, the testator may, if he pleases, make only one original testament, or make two or more originals, for the surer preservation of his will, depositing them in different places, or keeping one original in his own custody, and depositing another in the hands of some other person.[u]

XVIII.

3005. *The Testament is common to all Parties that have an Interest under it.* — Seeing a testament is a title that belongs in common to the heirs or executors, to the legatees, to the persons who are substituted, or other persons who have interest in any of the dispositions thereof, every one of those who may have any interest under it has a right to have this title in his custody. But since they all cannot have the original testament, every person that has an interest in it may get a copy of it written in due form, and signed by the public officer that has the custody of the original; and such a copy will serve in place of the original.[x]

SECTION II.

WHO MAY MAKE A TESTAMENT, AND WHO IS CAPABLE OF BEING HEIR OR EXECUTOR, OR A LEGATEE.

3006. THERE are two things to be considered in a testament, in order to know its validity and what effect it may have. One is, to know whether the person that has made the testament had power to make one; and whether the persons in favor of whom the testator has disposed of his goods are capable of receiving what is given them; and this shall be the subject-matter of this section. The other is, to know if the testament is made according to form; which shall be explained in the following section.[a]

[t] See the seventeenth article of the third section.
[u] *L.* 24, *D. qui test. fac. poss.* See the ninth article of the seventh section.
[x] *L.* 2, *D. testam. quem aper. inspic. et descr.*
[a] *L.* 4, *D. qui test. fac. poss.*

3007. It is to be observed on the subject-matter of this section, that besides the causes of incapacity of receiving a benefit by a testament, which are here explained, we have in France two rules which annul the dispositions of some persons made in favor of others, to whom it is prohibited to give any thing. One is of the ordinance of Francis I., in the year 1539, art. 131, and of Henry II., in the year 1549, art. 2, which annuls all donations, whether by testament or otherwise, that may be made by minors to their tutors, curators, guardians, and other administrators, during their administration, or to other persons for their behoof. And the other is that of some customs which forbid the dispositions made by the wife in favor of her husband, or by the husband in favor of his wife; which some customs restrain to the dispositions of the wife in favor of her husband, and do not prohibit those of the husband in favor of his wife.

3008. It may also be proper to observe, in relation to the capacity of making a will, that there are some customs where a married woman is not allowed to make her will, unless it be with the permission of her husband, or that she had this power given her by the contract of marriage.

3009. We must remark here, with respect to the incapacity of making a will, that we have not set down in this section a rule of the Roman law, which some readers, perhaps, may find fault with, and therefore we have thought fit to give the reason why we have omitted it. It is that rule which directs that persons who doubt of their state and condition may not make a will;[b] from which rule soldiers were excepted,[c] who had power to make a will notwithstanding this doubt. Thus, he who was uncertain whether he was under his father's power, or emancipated, could not make a testament,[d] because a son that was still in his father's family could not make a will.

3010. We have judged it proper not to insert this rule here: for to all appearance there can never happen any case where it can be put in practice; and whenever there is a testament, it is natural to presume that he who made it did not doubt of his having power to make it; and one would not start the question to know whether he was in this doubt or not. But even although we should suppose that a testator had some reason to doubt of his

[b] *L.* 15, *D. de test. mil.*
[c] *L.* 11, § 1, *D. eod.*
[d] *L.* 9, *D. de jur. codicil.*

condition, and that he was really uncertain of it, would this reason alone be sufficient to hinder him from making his will? Thus, for example, if we suppose that a young man of the age of fourteen years complete, being out of his own country, and not knowing precisely the day of his birth, should happen to fall sick, and should make a testament, being uncertain whether he was of sufficient age to make a will or not; but still, thinking it better to make a testament, that may be valid if it should appear that he had the age that was necessary, than to omit making one, because that the testament which he should make would be null if it appeared that he was not of the age that is required; would it be said of such a testament, that it ought to be annulled, because the testator was ignorant of a fact which, if he had known it, would have added nothing either to his age or to his experience? But would ever any one think of demanding whether this young man knew his own age? And if any one should start this doubt, which would appear very odd, would it not be sufficient that this testator had really the age and power requisite for making a testament, to make it valid in these circumstances? To which we may add, that since this rule did not take in the case of soldiers, we may infer from thence that even the authors of it did not look upon it to be a rule of the law of nature; for in that case it would not have been just to dispense with the observance of it, even in soldiers. But the law of nature demands that truth should always have its effect, and that he who has acquired a right should not be deprived of it, under pretext that he doubts whether his right be secure. This effect of truth has been found so just, even by the authors of the niceties in the Roman law, that we see in a law that he who, being his own master, and free from his father's authority, and by that means capable of inheriting an estate that had fallen to him, might inherit it, although he not only doubted of his being his own master, but was falsely persuaded of the contrary, thinking himself still to be under his father's power.[e] Thus, they were convinced that truth ought to supply, not only a doubt, but even an error of this kind.

ART. I.

3011. *Those who are under no Incapacity may make a Will.*— To know who are the persons that have the power of making a

[e] See *L.* 21, *D. de cond. et dem.*

testament, or receiving any benefit by one, it is necessary to know whom the law has rendered incapable thereof; for whoever is under no incapacity is capable both of the one and the other.[a]

II.

3012. *Males under Fourteen, and Females under Twelve Years of Age, cannot make a Will.*— The causes which render persons incapable of making a will proceed from some one of those qualities which have been explained in the title of *Persons;* such as the qualities of unripeness of age, of being a foreigner, being under sentence of death, and others. Thus we may reckon, as the first cause of incapacity of making a testament, the want of that age which is called in the Roman law *pubertas*, that is, fourteen years complete in males, and twelve years complete in females; for those that have not accomplished this age cannot make a will.[b] And although even one that had made his testament before he had attained fourteen years of age should not die till a long time after, so that it might be said that, being of age sufficient, and capable of making a testament, he had approved of that which he had made when he was under age by not altering it; yet this testament, being null in its origin, would not be made valid by this circumstance.[c]

Remarks on the Preceding Article.

3013. We have said in the article, that it is necessary to have this age complete, *annum completum*, as is said in the second of the

[a] *L.* 4, *D. qui test. fac. poss.*

[b] Testamentum facere non possunt impuberes quia nullum eorum animi judicium est. § 1, *Inst. quib. non est perm. fac. testam.*

It seems to have been a doubt heretofore in the Roman law, whether eunuchs could make a will, because they could never attain to a true puberty: and they were allowed to make a will only at the age of eighteen years. *Paulus, lib.* 3, *Sent. tit.* 4, § 2. But the Emperor Constantine allowed them to make their wills at the same time that others did. *L.* 5, *Cod. qui test. fac. poss.*

A qua ætate testamentum vel masculi vel fœminæ facere possunt, videamus. Verius in masculis quidem quartum decimum annum spectandum: in fœminis vero duodecimum completum. Utrum autem excessisse debeat quis quartum decimum annum ut testamentum facere possit, an sufficit complesse? propone aliquem kalendis Januariis natum, testamentum ipso natali suo fecisse, quarto decimo anno, an valeat testamentum? Dico valere. Plus arbitror, etiam si pridie kalendarum fecerit, post sextam horam noctis, valere testamentum. Jam enim complesse videtur annum quartum decimum, ut Marciano videtur. *L.* 5, *D. qui test. fac. poss.*; — *v. l.* 1, *D. de manumiss.*

[c] Si filius familias aut pupillus tabulas testamenti fecerit, signaverit, secundum eas bonorum possessio dari non potest. Licet filius familias sui juris, aut pupillus pubes fac-

texts quoted on it; but the words following raise a difficulty which we ought not to pass over in silence; for although the natural sense of these words, *fourteen years complete*, seems to require that the last moment of the fourteenth year should be expired, since it is only at that moment that it is accomplished, yet what follows in the said law appears to be contrary to it. For these words, *utrum excessisse debeat, an sufficit complesse*, and the rest that follows, purporting that the testament is good if it is made on the birthday, or even on the eve thereof, intimate sufficiently that the year is held for accomplished before the last moment of it is expired, in what manner soever we understand the eve of the birth. For that may be understood two ways. The one is, in counting the eve of the birthday according to the computation of the days of the year; so that in the case of one born the first day of January, which is the case of this law, the eve of the birthday would be the last day of December. The other way is, in taking for the eve of the birthday the four-and-twenty hours which precede the moment of the said birth.

3014. It seems to be the first of these two ways to which this law determines the eve of the birthday, since it supposes a testament made in the morning of the said eve, without distinguishing at what hour the testator was born. So that since, according to the Roman usage, the day begins at midnight,[d] it seems that, according to this rule, a testament might be good, although it should precede the moment of the testator's birth more than four-and-twenty hours. For if we suppose, according to this law, that the birthday is the 1st of January, and that the eve of the said day begins from the midnight of the foregoing day, that is, at midnight between the 30th and 31st of December; and that the testator, born in the afternoon of the 1st of January, makes his will in the morning of the 31st of December; it would seem that, according to the terms of this law, this testament ought to be good, although it preceded more than a whole day the moment of the testator's birth, since it would be true that it had been made on the eve of the said birth. But this seems neither to be regular, nor conformable to our usage, as shall be shown hereafter.

3015. It may be observed, with respect to this way of holding the year for accomplished in the beginning of the last day, that it

tus decesserit. Quia nullæ sunt tabulæ testamenti, quas is fecerit, qui testamenti faciendi facultatem non habuerit. *L.* 19, *D. qui testam. fac. poss.*

[d] *V. l.* 8, *D. de feriis.*

was not so in all sorts of cases; for not only prescriptions require the entire accomplishment of the year, as has been said in its place, but even as to the age which excuses one from being tutor, it is necessary that the last moment of the last year should be expired.[c] In relation to which it may be said, that there would be as much, or more, reason for excusing one from being tutor in the last day of his seventieth year, as for granting leave to one to make a testament on the last day of his fourteenth year. And as to what concerns the full age for making a testament, it seems that the sense of these terms, a *year complete*, is understood, according to our usage, of a year expired, especially in the customs; for those which fix the age for making a will require the years to be accomplished, and those also which mention any thing of the matter do none of them almost allow of the making of a will before the age of twenty years in sons, and eighteen in daughters, even as to the estate which they may have besides what has come to them by descent; and as to the estate which they have inherited by descent, they require five-and-twenty years. So that the spirit of these customs is not to favor a dispensation in point of time; and likewise they do not insinuate, as this law does, that the year should be held for accomplished at the beginning of the last day, and much less the eve of it. Therefore we have restrained ourselves in the article from saying that it is necessary that the age should be accomplished, that is, that they should have the age which the law requires; for this expression might be accommodated even to those usages which should only demand that the last day should be begun, taking it in the sense of these words of the second of the texts quoted on this article, *Utrum excessisse debeat, an sufficit complesse.* The difficulty which has engaged us to make this remark might be placed among the number of those which may require some regulation.

III.

3016. *Sons who are still under their Father's Authority cannot make a Will.* — Sons who are still under their father's power and authority, not having been emancipated, cannot make a testament,[d] unless it be to dispose of those sorts of *peculiar* goods of which they are wholly and solely masters, and which we have spoken of in the proper place.[e]

[c] Excessisse oportet 70 annos. *L. 2, D. de excus.; — l. un. Cod. qui ætat.*

[d] *L. 6, D. qui test. fac. poss.; — l. penult. C. qui test. fac. poss.*

[e] *L. ult. C. eod.* This rule, with the exception as to these peculiar goods, is observed in

IV.

3017. *Madmen cannot make a Testament, except in a Lucid Interval.* — Those who are in a state of madness cannot make a testament, unless it be that they have intervals of reason, which may suffice for such a disposition, and that the testament be begun and accomplished, in all its formalities, in an interval where the use of reason has been perfectly free.[f]

V.

3018. *Old Men, Sick and Infirm Persons, may make a Will.* — The infirmities of old age, and diseases which do not take away the use of reason, are no hindrance to those who are in that condition to make their will.[g]

VI.

3019. *A Prodigal cannot make a Testament.* — Prodigals who are interdicted, being incapable of administering their goods during their life, are likewise incapable of disposing of them in view of death. For the same cause which deserves the punishment of interdiction deserves likewise that of the incapacity of making a testament. And whether we consider the bad use that a prodigal who is interdicted may make of the liberty to make a will, or the consequence of punishing him for his bad conduct by depriving him of this liberty, although he might even make a good use of it,

some customs. See, touching these peculiar goods, and touching emancipation, what has been said thereof in the preamble of the second section, *How Fathers succeed*, and in the third article of the same section.

Although it may seem that this rule, which renders sons who are still under the paternal power incapable of making a testament, was in the Roman law a consequence of this, that the son who was still under his father's jurisdiction could acquire nothing but what belonged immediately to his father, excepting those peculiar goods which are mentioned in the article (*Ulpian. tit.* 20, § 10); yet it appears by the second text cited on this article, that Justinian, who gave to sons living still under the father's power the property of the goods which they might happen to acquire, leaving only to the fathers the usufruct of them, did not grant to them however the power to dispose of any other goods by testament besides those peculiums: which shows us that the Emperor Justinian was of opinion, that the liberty of disposing of the said peculiar goods was not so much an effect of the right of property as of the merit of the son, who, having rendered himself worthy of such an acquisition, had likewise the privilege to dispose thereof. And as for the other goods, he could not become capable of disposing of them but by emancipation.

[f] *L.* 2, *D. qui test. fac. poss.*; — *l.* 9, *C. qui test. fac. poss.*; — § 1, *Inst. quib. non est perm. fac. test.*

[g] *L.* 3, *C. qui test. fac. poss.*; — *l.* 2, *D. eod.* There are some customs where dispositions made in view of death are null, if the persons who have made them have not survived three months after making the said dispositions. See the preface to this second part, no. 7.

it is for the interest of private families, and also of the public, that a person of so bad a conduct as a prodigal that is interdicted should not have power to make a will.[h]

REMARKS ON THE PRECEDING ARTICLE.

3020. With respect to this matter of a prodigal's testament, we may distinguish between that which he makes after his interdiction, and that which he may have made before. And the Emperor Leo, in his 39th novel, makes even a distinction of the testaments which prodigals make after their interdiction, approving those which are reasonable, and rejecting the others. But besides that the novels of the Emperor Leo are not received in France, this distinction serves only to raise lawsuits: and it is easier and more equitable to annul without distinction every testament made by a prodigal after his interdiction. But as to the testament made before the interdiction, there is greater difficulty to know if it ought to subsist. And although the question be decided by the texts cited on this article, which determine that this testament should have its effect, yet it will not be amiss to consider some inconveniences that may follow from this rule. For as it is certain that prodigals are interdicted only for their bad conduct which has preceded the interdiction, and that it is because of this bad conduct that they are incapable of making a testament; so the same reason which requires that the testament made after the interdiction should be annulled, seems likewise to demand that the testament made before the interdiction should also be annulled. For it is natural to presume, that since a prodigal never thinks of making a testament, unless he is put upon it by other persons, so he would not have made his will but by the influence of his accomplices in his debaucheries, and in their favor. And it might likewise happen, that a testament, which ought to be altered because of the changes that may have happened in the family of the prodigal after his interdiction, could not, nevertheless, be reformed, because the prodigal after his interdiction being incapable of making a will, he could not make any new dispositions.

VII.

3021. *He who is both Deaf and Dumb cannot make a Will.* — He who is both deaf and dumb, whether from his birth or otherwise,

[h] *L.* 18, *D. qui test. fac. poss.*; — § 2, *Inst. quib. non est perm. fac. test.*

and who can neither write nor read, being incapable of giving any sign of his will, is incapable of making a testament. But if one, who, during the time that he was neither deaf nor dumb, had made a testament in due form, happens afterwards to fall under these two infirmities, although this accident renders him incapable of confirming his will, or altering it if he would, yet the testament which he had made in the time that he was capable of doing it would still subsist.[l]

VIII.

3022. *If he knows how to write, he may make a Testament.* — He who, not having been born both deaf and dumb, should become so by some accident, after having learned to write, might make his testament; for he might explain his will by writing it himself, and observing in it the formalities which shall be explained in the third section.[l]

IX.

3023. *The Deaf Man who can speak may make a Will.* — Those who are only deaf without being dumb, as if their deafness happened only after they had acquired the use of speech, may make a testament; for they are capable of explaining their intentions; and much more, if they know how to write.[m]

X.

3024. *Dumb Persons who are not Deaf may make a Will, if they know how to write.* — Dumb persons, although they are so from their birth, yet if they are not deaf, and know how to write, since they are able to explain their will, are capable of making a testament. But if they cannot write, not being able to explain

[l] *L.* 6, § 1, *D. qui test. fac. poss.*; — *l.* 10, *C. qui test. fac. poss.* It appears from the first of these two texts, that, by the ancient law, he who was only deaf without being dumb, and he who was only dumb without being deaf, could not make a testament. Because he that was deaf could not hear the persons whose presence was necessary to the making of his testament, and he that was dumb could not explain his intention to the witnesses. But they might make a testament if they obtained leave from the prince. *V. l.* 7, *eod.* See the following articles.

[l] *L.* 6, § 1, *D. qui test. fac. poss.*; — *l.* 10, *C. qui test. fac. poss.* See the eighteenth and twentieth articles of the third section, and the remark on the seventeenth article.

[m] *L.* 10, *C. qui test. fac. poss.* See the twentieth article of the third section, and the remark on the seventeenth article of the same section.

themselves but very imperfectly and by signs, they have not the liberty of making a testament.[n]

XI.

3025. *Blind Persons may make a Testament.* — Persons that are blind, whether they be such from their birth or otherwise, may make their testament, observing therein the formalities which shall be explained in the third section.[o]

XII.

3026. *Strangers cannot make a Testament.* — Strangers, who are called aliens and foreigners, cannot make a testament, or other disposition in view of death.[p]

XIII.

3027. *A Monk may make a Will before his Profession.* — Professed monks are incapable of making a testament after they have taken upon themselves the vows. But they may make their will at any time before they take the vows, even although they wear the religious habit, during the time of their probation or novitiate; and their testament will have its effect as soon as they have made their solemn profession. For that is considered as a civil death; which, stripping them of all their goods, has the same effect, with respect to their testament, as a natural death.[q]

XIV.

3028. *Persons condemned to Death cannot make a Testament.* — Persons condemned to death, or to other punishments which import civil death, and confiscation of goods, cannot make a testament. And this state annuls even the testament which they may have made before their condemnation, and before they committed the crime.[r] But if he who, having appealed from his condemna-

[n] *L.* 10, *C. qui test. fac. poss.* See the seventeenth and twentieth articles of the third section.

[o] See the twentieth article of the third section.

[p] See the eleventh article of the second section of *Persons*, the ninth article of the second section of *Heirs and Executors* in general, and the other articles which are there cited. We must except from this rule the case which has been observed on the third article of the fourth section of *Heirs and Executors* in general.

[q] See the twelfth article of the second section of *Persons*, the tenth article of the second section of *Heirs and Executors* in general, and the other articles which are there cited.

[r] *L.* 8, § 1, *D. qui test. fac. poss.*; — *l.* 1, § 2, *D. de leg.* 3; — *l.* 6, § 8, *D. de inj. rupt.*

tion, and having made afterwards his testament, happens to die before the appeal has been determined, this testament, or any other which he had made before his condemnation, would have its effect. For in criminal matters the appeal extinguishes the sentence. And seeing, after the death of the party accused, there can be no further condemnation, his condition remains the same that it was before he was condemned.[s] But we must except from this rule those who are condemned for, or accused of, those sorts of crimes which may be prosecuted after the death of the criminal; for in these cases the validity of the testament depends on the event of the accusation.[t]

XV.

3029. *Bastards may make a Testament.* — The incapacity of bastards is limited to exclude them only from succeeding to intestates, and does not hinder them from disposing of their effects by a testament.[u]

XVI.

3030. *Difference between the Incapacity of Foreigners, of Condemned Persons, and that of others.* — There is this difference to be remarked among the several incapacities which we have just now explained, that the incapacity under which foreigners are, and that of persons condemned to death, do not only annul the testaments of those who are under either of these two incapacities at the time that they make their testament; but if they shall happen to him who had made his testament when he was under no incapacity, and if he chances to be under either the one or the other of these two incapacities at the time of his death, his testament will be annulled. For all those who die in this state can have no heirs or executors. But the other incapacities which may happen to a testator after he has made his testament, although they should continue to the moment of his death, yet they make no change in his testament. Thus, profession in religion, after a testament, is a kind of civil death; but which is so far from an-

[s] *L.* 9, *D. qui test. fac. poss.*; — *l.* 1, § 3, *D. de leg.* 3; — *l.* 13, § 2, *D. qui test. fac. poss.*; — *l.* 1, § *ult. D. ad senat. Turpill.*

[t] *L.* 20, *D. de accus. et inscript.* See the eleventh article of the second section of *Heirs and Executors* in general, and the other articles which are there quoted.

[u] See the eighth article of the second section of *Heirs and Executors* in general, and the articles there cited.

nulling the testament, as the incapacity of a condemned person does, that it has the quite contrary effect, to confirm it, and to lay the succession open, and to call thereto the person that is named heir or executor. Thus, madness, and the other infirmities which happen to a testator after his testament, and which render him incapable of making a new one, fix his will to what it was at the last moment that he had the free use of it.[x]

Remarks on the Preceding Article.

3031. It is in the sense of the rule explained in the beginning of this article, that we ought to understand that other common rule, which says, that a testament which was valid in the beginning becomes null, if afterwards things happen to be in such a condition that, if the testament were then made, it would be of no force. *Quæ in eam causam pervenerunt, a qua incipere non poterant, pro non scriptis habentur. L.* 3, § *ult. D. de his quæ pro non script. Quia in eum casum res pervenit a quo incipere non potest. L.* 19, *D. ad leg. Aquil.* But this last rule, if it were applied without distinction, would often mislead us; for it frequently happens that an act subsists, although he who made it afterwards falls into a state in which he could not make it. Thus, a marriage is not annulled by the husband or wife's becoming mad; nor a contract of sale, although the seller is afterwards interdicted as a prodigal. And it is the same thing with respect to testaments, in the other cases explained in this article. And it is likewise said in another rule, that it is no new thing for that which has once been valid not to cease to be so, although the case happens that one is in such a condition, that, if he did it at that time, it would be invalid. *Non est novum, ut quæ semel utiliter constituta sunt, durent, licet ille casus extiterit a quo initium capere non potuerunt. L.* 85, § 1, *D. de reg. jur.*

XVII.

3032. *The Subject-Matter of the following Articles.* — We have explained in the foregoing articles what relates to the capacity or incapacity of making a will; and it now remains that we should inquire who are the persons that may be named heirs or executors, or receive any benefit by a testament: which depends on knowing who are the persons that have not this right; for besides them, all

[x] *L.* 8, § 1, *D. qui test. fac. poss.*; — *l.* 1, § 2, *D. de legat.* 3; — *l.* 6, § 8, *D. de injust. rupt. ir.*

others have it. And there are two sorts of persons who have it not; those who are incapable, and those who are unworthy of it.[y]

XVIII.

3033. *Difference between the Incapacity of making a Will, and that of receiving Benefit by one.* — The incapacities of making a will, and those of receiving benefit by one, are not the same; for there are persons incapable of making a testament, who are not incapable of receiving benefit by one. But there is no person who is capable of making a will, who is not likewise capable of receiving benefit by a will. And there are some who are incapable both of the one and the other, as we shall see by the following articles.[z]

XIX.

3034. *Persons incapable of making a Testament, but capable of receiving Benefit by one.* — Persons who have not the age required for making a will, madmen, those who are both deaf and dumb from their birth, prodigals that are interdicted, and those whom some infirmity renders incapable of making a testament, are not for that incapable of being named heirs or executors, or of receiving any other advantage by a testament. For although they may be incapable of alienating their goods, and disposing of them, yet nothing hinders them from being capable of acquiring and possessing goods.[a]

XX.

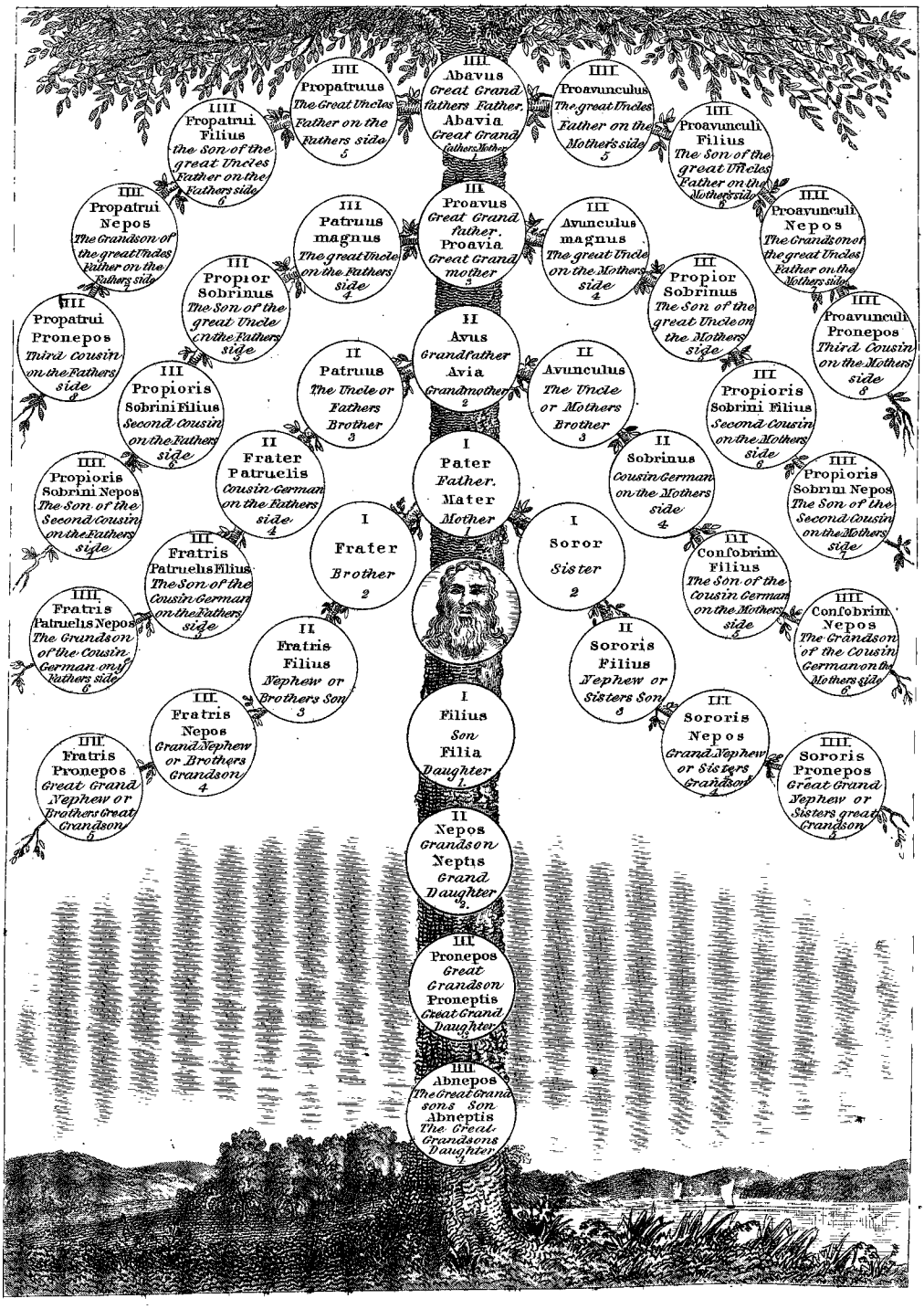
3035. *Persons incapable both of the one and the other.* — Foreigners, professed monks, and persons condemned to death, are incapable of receiving benefit by a testament, whilst they remain under these incapacities, as has been explained in its place.[b]

[y] See the articles which follow.

[z] See the following articles. We may remark on what is said in this article, that all those who are incapable of making a testament are likewise incapable of receiving any benefit under a testament; that although all strangers are incapable of receiving any benefit by a testament, yet it may happen that a stranger may be capable of making a testament in the case that has been observed on the third article of the fourth section of *Heirs and Executors* in general. But this case does not hinder the rule from being true in general; for that stranger cannot make a testament but by virtue of a dispensation which suspends his incapacity, but does not make it to cease totally.

[a] See the seventh article of the second section of *Heirs and Executors* in general.

[b] See the ninth, tenth, and eleventh articles of the second section of *Heirs and Executors* in general, and the other articles there cited.


IIII. Abavus Great Grand fathers Father. Abavia Great Grand fathers Mother 1
IIII. Propatruus The Great Uncles Father on the fathers side 5
IIII. Proavunculus The great Uncles Father on the Mothers side 5
IIII. Propatrui Filius the Son of the great Uncles Father on the fathers side 6
IIII. Proavunculi Filius The Son of the great Uncles Father on the Mothers side 6
III. Proavus Great Grand father. Proavia Great Grand mother 3
III. Patruus magnus The great Uncle on the Fathers side 4
III. Avunculus magnus The great Uncle on the Mothers side 4
IIII. Propatrui Nepos The Grandson of the great Uncles Father on the fathers side
IIII. Proavunculi Nepos The Grandson of the great Uncles Father on the Mothers side
III. Propior Sobrinus The Son of the great Uncle on the Fathers side 5
III. Propior Sobrinus The Son of the great Uncle on the Mothers side 5
IIII. Propatrui Pronepos Third Cousin on the Fathers side 8
IIII. Proavunculi Pronepos Third Cousin on the Mothers side 8
II. Avus Grandfather Avia Grandmother 2
II. Patruus The Uncle or Fathers Brother 3
II. Avunculus The Uncle or Mothers Brother 3
III. Propioris Sobrini Filius Second Cousin on the Fathers side 6
III. Propioris Sobrini Filius Second Cousin on the Mothers side 6
I. Pater Father. Mater Mother 1
II. Frater Patruelis Cousin German on the Fathers side 4
II. Sobrinus Cousin German on the Mothers side 4
IIII. Propioris Sobrini Nepos The Son of the Second Cousin on the Fathers side 7
IIII. Propioris Sobrini Nepos The Son of the Second Cousin on the Mothers side 7
I. Frater Brother 2
I. Soror Sister 2
III. Fratris Patruelis Filius The Son of the Cousin German on the Fathers side 5
III. Confobrini Filius The Son of the Cousin German on the Mothers side 5
IIII. Fratris Patruelis Nepos The Grandson of the Cousin German on the Fathers side 6
IIII. Confobrini Nepos The Grandson of the Cousin German on the Mothers side 6
II. Fratris Filius Nephew or Brothers Son 3
II. Sororis Filius Nephew or Sisters Son 3
III. Fratris Nepos Grand Nephew or Brothers Grandson 4
III. Sororis Nepos Grand Nephew or Sisters Grandson 4
IIII. Fratris Pronepos Great Grand Nephew or Brothers Great Grandson 5
IIII. Sororis Pronepos Great Grand Nephew or Sisters great Grandson 5
I. Filius Son Filia Daughter 1
II. Nepos Grandson Neptis Grand Daughter 2
III. Pronepos Great Grandson Proneptis Great Grand Daughter 3
IIII. Abnepos The Great Grandsons Son Abneptis The Great Grandsons Daughter 4

XXI.

3036. *Bastards capable of receiving Benefit by a Testament.* — Although bastards are incapable of succeeding to intestates, yet they may be instituted heirs or executors, and may receive any other benefit by a testament, except in some cases, which are explained in their proper places.[c]

XXII.

3037. *Children which are not born.* — Children who are not yet born may be instituted heirs or executors in a testament, not only by their fathers and mothers, but by any other person, and even by strangers. They are likewise capable of receiving legacies, or any other benefit by a testament.[d]

XXIII.

3038. *Children which are not conceived.* — We must reckon among the number of those who are capable of receiving benefit by a testament, children who are not as yet conceived, and who shall be born. For not only may the parents of those children institute them heirs or executors, or substitute them to others, but every other person that is capable of making a will may name for his successor a child which shall be born of the marriage of such persons, whom he is desirous to gratify in this manner, although he is noways related to the said persons. And this institution will have its effect, if at the time of the testator's death there is a child conceived of this marriage, although it is born only after the said death.[e] And one may likewise substitute children which shall not be born until a great many years after the death of the person who makes the disposition.[f]

XXIV.

3039. *One may institute an Heir or Executor, without naming*

[c] See the eighth article of the second section of *Heirs and Executors* in general, and the articles there quoted, and the remarks on that eighth article.

[d] See the thirteenth article of the second section of *Heirs and Executors* in general.

[e] Posthumus alienus rectè hæres instituitur. *Inst. de bonor. poss.* See the thirteenth article of the second section of *Heirs and Executors* in general. Such an institution would be as it were conditional, in case the said child should be conceived at the time of the testator's death.

It is very usual, in favor of contracts of marriage, to make such institutions of children which shall be born of the said marriage, or to give some advantage to the males, or to the eldest children, who shall be born of the said marriages.

[f] See the third title of the fifth book.

him expressly, designating him only by some Distinguishing Quality. — It is not necessary for the instituting of an heir or executor, that he be named by his name in the testament; for the institution will have its effect if he is designated by his quality, or by such circumstances as may distinguish him, and make him so well known, that there can be no doubt of the institution's being in his favor. As if the testator had named for his heir or executor a bishop, a first president, an attorney-general, the dean of a chapter, or some other person who may be distinguished and marked out precisely by some particular quality in a certain place.[g]

Remarks on the Preceding Article.

3040. What is said in this text of an institution which should be made in terms reproachful to the heir or executor, to describe him by that distinction, has not been set down in the article. For besides that in all appearance it never happens, at least among us, that a testator should be willing to affront his heir or executor, at the same time that he leaves him his estate, it might so fall out that a father, justly irritated against his son because of his disorderly life, and yet not being willing, or even not able, to disinherit him, but being only desirous to show the just occasion he has had in his lifetime to be dissatisfied with this son, and to make him sensible of his anger in order to bring him back to his duty, should declare in his testament, that although his son had rendered himself unworthy of his succession by his disorderly life, yet for all that he names him his heir or executor: and this disposition would not be null.* But if the heir or executor, not being son to the testator, was instituted with some reproachful or injurious expression or description, it is by the circumstances that we ought to judge whether such an institution may have any cause which ought to make it to subsist, the heir or executor being willing to accept of the succession, or whether the institution is so far contrary to reason and good manners that it ought to be annulled.

XXV.

3041. *The Heir or Executor may be a Person unknown to the Testator.* — One may likewise name for his heir or executor an un-

[g] Si quis nomen hæredis quidem non dixerit, sed indubitabili signo eum demonstraverit, quod pene nihil a nomine distat, non tamen eo quod contumeliæ causa solet addi, valet institutio. *L.* 9, § 8, *D. de hæred. instit.*

* *L.* 48, § 1, *D. de hæred. inst.*

known person, provided that the testator, who, perhaps, has never seen the said heir or executor, points out his person by such circumstances as may make him easily known; as if it is the son of one of his brothers, or other near relation, whom he had never seen because of a long absence; or even a stranger distinguished by some mark, such as some particular favor which the testator may have received from him, and which he explains in such a manner, that, although the author of this kindness was unknown to him, yet this circumstance may afterwards make him easily known.[h]

XXVI.

3042. *The Institution Null, by Reason of the Uncertainty of the Heir or Executor.* — If the testator, in the naming of his heir or executor, should express himself in such an obscure and equivocal manner, that it is not possible to know whom he intended to name for his heir or executor, it being impossible that such an institution can have its effect, it would remain null. Thus, for example, if there are two persons of the same name, who are equally friends to the testator, and he should name one of them to be his heir or executor, but in such a manner that it is not possible to distinguish which of the two he means, this uncertainty would exclude both the one and the other from the succession:[i] for it could not be said that both those persons should be heirs or executors, since the testator intended only one of them; and it could not be said of either of the two, that he was the person whom the testator had made choice of. Thus, in this case, if it were possible that it could happen, it would be juster to leave the succession to the next of kin, than to hazard the giving of it to one of the two whom the testator was not willing to have for his successor; and this event ought to be imputed to the testator's want of exactness.

Remarks on the Preceding Article.

3043. If the case of this article could fall out, and the two persons of the same name should agree among themselves to divide the succession, could the next of kin hinder the same by reason of the nullity arising from the uncertainty, which makes it impossible

[h] *L.* 11, *C. de hæred. inst.*; — § *ult. Inst. eod.*; — *v. l.* 46, *D. eod.* See the following article.

[i] *L.* 62, § 1, *D. de hæred. inst.* See the twenty-fifth article of the eleventh section of *Legacies.*

to discover which of the two is the heir or executor? Or might they say that one of them is certainly the person whom the testator had called to his succession, and that therefore, they both yielding to one another reciprocally the right that each of them might have to it, their agreement among themselves would have the effect of rendering the succession common to them? Since one of the two is certainly called to the succession, and gives a share of it to the other, and it ought to be indifferent to the next of kin, who is deprived of the succession by the testament, whether it remain entire to one alone, or whether it be divided among two. But since the quality of executor, or testamentary heir, cannot be acquired but by the will of the testator, the agreement of these two persons cannot make them both heirs or executors: for besides that the person whom the testator had a mind should be his heir or executor cannot be sure himself that he has this quality; it is most certain as to the other, not only that he cannot be heir or executor, but likewise that he cannot he coheir or coexecutor, since, although the person from whom he derives his right should be acknowledged for the true heir or executor, yet he cannot make a coheir or coexecutor, who shall immediately succeed to the testator in one half of the succession. And the said conveyance or assignment would only make him a purchaser of that moiety of the succession, and not an heir or executor chosen by the testator. Thus, since neither of the two can be certainly heir or executor, nor by any means coheir or coexecutor, such a disposition, which is impossible to be executed, ought to remain null.

XXVII.

3044. *Persons Unworthy cannot receive any Benefit by a Testament.* — We may reckon in the number of persons who cannot receive any benefit by a testament, those who have rendered themselves unworthy of it. And since the causes which may have this effect have been explained in their proper place,[k] and there is nothing necessary to be repeated here, it is sufficient for the order of the subject-matter of this section, that we have here taken notice of it.

[k] See the third section of *Heirs and Executors* in general.

SECTION III.

OF THE FORMS AND FORMALITIES NECESSARY IN TESTAMENTS.

3045. We call those things forms or formalities of an act, which the laws have established to be proofs of its verity, and thereby to establish its validity. Thus, to make a sale, an exchange, a lease, a loan, or other covenant, which may have its effect, it is necessary to make an act of it, that is, a writing which may explain the intention of the parties, to be signed by them; or if one or other of them cannot write their names, that it be made in the presence of a notary public and two witnesses, or of two notaries without witnesses.[a] Thus, to have a right of mortgage according to our usage, a covenant signed only by the parties would not be sufficient; but it is necessary that the act which is to give the mortgage should be passed either in a court of justice, or before two notaries, or before one notary and two witnesses. Thus, for the validity of a donation that is to have its effect in the lifetime of the donor, it is not enough that the act thereof be written and executed in the presence of notaries public, but it is moreover necessary that it be enrolled.[b]

3046. We see, in all these sorts of acts, that these formalities have been invented in order to make them valid, that is, to make them have their effect by the proof which they make of their truth. But if it is necessary in all sorts of acts that they should have some formality to prove their truth in order to give them the effect which they ought to have, there is as much or more necessity that an act so serious and of so great importance as is a testament should be accompanied with proofs of the will of the testator, which may not only remove all suspicion of the forging of another will than his, but which may give also his testament the character of a will well concerted, by the firmness and authority of which the peace and quiet of the families that are interested in it may be established.

3047. It was upon these considerations that in the Roman law, which allowed the making of a testament by word of mouth and

[a] See, touching the necessity of making acts in writing, the remark that has been made on the twelfth article of the first section of *Covenants*, and the preamble of the second section of *Proofs*.

[b] See the fifteenth article of the first section of *Donations*.

without writing, it was ordained, that it could not be made without the presence of seven witnesses above fourteen years of age, and citizens of Rome. And the same number of witnesses was likewise made necessary for written testaments.

3048. This usage as to the number of seven witnesses is preserved in the provinces of France which are governed by the written law; but in the other provinces no more witnesses are required to testaments than to contracts, and two witnesses suffice with a notary public, or two notaries without other witnesses. And there are even some places where they are governed by the written law, where the same formality suffices for testaments. But instead of this great number of witnesses, some customs have prescribed other forms; such as that the testators shall read over and over the testaments which they have dictated to the notaries public, and that express mention be therein made that this formality hath been observed. We may add, as to what concerns the formalities of testaments, that by the ordinances of Orleans, art. 27, and of Blois, art 63, one may make a testament before a curate or a vicar, instead of a notary public, observing therein the usual formalities.

3049. We have thought fit not to set down among the rules of this section that rule of the Roman law which requires that the witnesses should be called expressly for that end. This formality was judged necessary for testaments that were not written;[c] but according to the usage in France, which requires that the testament be in writing, it suffices if the witnesses are present at the reading and signing of the testament. And although the notaries usually make mention in the testaments that the witnesses have been expressly called for that purpose, yet it seems that the testament ought not to be null, although this formality was omitted; for it is always certain that the witnesses have been desired to do this office, and this truth is sufficiently proved by their presence and signing. And we see even in the Roman law, that although the witnesses had not been called expressly for the testament, yet it was sufficient to acquaint them that their testimony was desired in that affair. *Licet ad aliam rem sint rogati, vel collecti, si tamen ante testimonium certiorentur ad testamentum se adhibitos, posse eos testimonium suum recte perhibere.* *L.* 21, § 2, *D. qui test. fac. poss.*

[c] See the remarks on the only article of the fourth section.

ART. I.

3050. *Seven Witnesses are necessary to a Testament.* — It is necessary for the validity of a testament, that the testator make it to be read in the presence of a public notary, and of seven witnesses that sign it with him. And if the testator or witnesses know not how, or are not able, to write, it is necessary that mention be made thereof in the testament.[a]

II.

3051. *The Witnesses ought to be present, and sign if they can.* — All the witnesses ought to be present at the same time, and in the same place where the testament is made, so as to hear the whole tenor of the testament. And although the testament had been written before, and in their absence, yet it is sufficient that they all be present to hear the testament read in presence of the testator; and that he declare to them that the said testament contains his will, of which the said writing, together with their uniform testimony, is to make the proof; and that, at the same time, without being interrupted by other business, the witnesses see the testator sign the testament, and they sign it with him.[b] For it is by the signing that the testament is to be accomplished, and to have its form.[c]

[a] Septem testibus adhibitis, et subscriptione testium. § 3, *Inst. de test. ord.* Si unus de septem testibus defuerit, vel coram testatore omnes eodem loco testes sue, vel alieno annulo non signaverint, jure deficit testamentum. *L.* 12, *C. de testam.* Septem testium præsentia in testamentis requiratur, et subscriptio a testatore fiat. *L.* 28, § 1, *eod.* See the following article.

Instead of sealing by the witnesses, which is mentioned in this law, and which is not in use with us except in some places, it is only the signing of the witness that is required, who is to write his name if he can, and is able to sign; and if not, the notary ought to make mention of it, according as it has been directed by the ordinance of *Orleans*, art. 84, and that of *Blois*, art. 165. See another form of a testament in the seventeenth article.

The rule explained in this article is to be understood according to the usage of the provinces which are governed by the written law. For in the customs so great a number of witnesses is not required, as has been explained in the preamble of this section. As to which it is to be observed in general, on the formalities of testaments, that we ought to observe those that are in use in the place where the testament is made: for the formalities being different in divers places, every place keeps to its own; and one ought not to set them aside in order to make use of those of other places, which perhaps may not be known there, and may be such that the notaries public either would not or could not substitute in the room of those they had been accustomed to. Thus, every place having a right to keep to its own approved usage, and which has passed into a law, it is sufficient for the validity of a testament, to observe therein the formalities that are used in the place where it is made. *V. l.* 9, *Cod. de testam.*

[b] *L.* 21, *C. de testam.*

[c] *D. l.* 21. See, as to the signing by the testator and witnesses, what has been said thereof in the first article.

III.

3052. *The Witnesses ought to be above Fourteen Years of Age.* — The witnesses ought to be above fourteen years of age, and to have none of the defects or other causes which may make their testimony null;[d] as shall be explained by the following rules.

IV.

3053. *Women cannot be Witnesses.* — Although women may bear witness in matters of fact of which the proofs depend on the declarations of persons who may happen to have any knowledge of them, even in crimes, yet they cannot be witnesses to a testament.[e] For there is this difference between voluntary acts where it is necessary to have witnesses, and the other cases of the proofs of facts, that in these we are not at liberty to choose whom we will to be witnesses, whereas in testaments and other acts the choice of the witnesses is altogether voluntary; and therefore, the function of bearing witness in these matters being more natural to men, it is not so proper to take in women among them.

V.

3054. *Mad Men, Deaf and Dumb Persons, and Prodigals, cannot be Witnesses.* — Mad men, deaf and dumb persons, and prodigals who are interdicted, cannot be witnesses in a testament.[f]

VI.

3055. *Nor Persons noted with Infamy.* — Persons noted with infamy cannot be witnesses in a testament, no more than in other acts.[g] Thus, all those who have been condemned to any punishment that renders them infamous, whether it be that the sentence of condemnation expresses the note of infamy, or that this note is a consequence of it, cannot be witnesses. And those whose profession may render them infamous are under the same incapacity.[h]

VII.

3056. *Nor Strangers who are called Aliens.* — Strangers who are

[d] Rogatis testibus septem numero, civibus Romanis, *puberibus omnibus*. *L.* 21, *C. de testam.*; — § 6, *Inst. de test. ord.*

[e] Neque mulier. § 6, *Inst. de testam. ord.*; — *l.* 20, § 6, *D. qui testam. fac. poss.*

[f] § 6, *Inst. de test. ord.*; — *l.* 18, *D. qui testam. fac. poss.*

[g] § 6, *Inst. de testam. ord.*; — *l.* 26, *D. qui test. fac. poss.*

[h] See the third and fifth articles of the third section of *Proofs*.

called aliens cannot be witnesses in a testament.[l] For the laws extend the incapacity of making a testament, and of receiving benefit by a testament, to that of being a witness to one. And it might happen that the stranger, who is taken to be a witness, might be under some incapacity which was not known.

VIII.

3057. *The Capacity of the Witness is considered at the Time of making the Testament.* — The quality of the witness, by which we are to judge if his testimony ought to be received, is considered only at the time of making the testament; for it is sufficient that he was then capable of being a witness. And the incapacity which had preceded the testament, but which had then ceased, or which happened only after the making of the testament, would be no hindrance why his testimony ought not to subsist; for it was only at the time that the testament was made that he performed the function of a witness.[l]

IX.

3058. *The Heir or Executor cannot be a Witness.* — The heir or executor named in a testament cannot be a witness to it: for it is his own affair; and he is the principal person interested in the validity of the testament.[m]

Remarks on the Preceding Article.

3059. If it were a private and secret testament, made in the manner which shall be explained in the seventeenth article, and if the testator had caused it to be signed by the person whom he had named in it his heir or executor, taking him for one of the witnesses, the better to conceal the contents of his will, would this testimony be rejected? and would the testament upon this account be null? The ground of doubting of it is, because that in these kinds of testaments the witnesses do not bear testimony to the dispositions made by the testator, which are unknown to them,

[l] Rogatis testibus septem numero, *civibus Romanis*. *L.* 21, *C. de testam.* Testes adhiberi possunt ii cum quibus testamenti factio est. § 6, *Inst. de test. ord.*

By the reason of the rule explained in this last text, persons condemned to any punishment which imports civil death cannot be witnesses; which is likewise extended, by the usage in France, to professed monks.

[l] *L.* 22, § 1, *D. qui testam. fac. poss.*

[m] *L.* 20, *D. qui testam. fac. poss.*; — *l.* 14, *D. de reb. dub.*; — *l.* 22, *C. de testam.*; — § 11, *Instit. de test. ord.*

but only to the declaration which he made to them, that they were contained in the writing or paper sealed up, which he only showed them, without reading it to them. Thus, the heir or executor, who should know nothing of his being instituted by this testament, to which he was called to be a witness, would not bear testimony to his being named therein heir or executor, for that he could not know; but only to the bare declaration of the testator, that his will was contained in that secret writing or paper sealed up; and which he might bear witness to, without being suspected of partiality in his testimony by reason of his interest under the will. So that it would seem that the motive of the law, which rejects the testimony of the heir or executor, would cease in such a case as this, unless there were some particular circumstances which might make some alteration; and that therefore this institution might upon these considerations have its effect.

3060. We have not inserted in the article, that the legatees may be witnesses to a testament, as the text bears from whence it is taken. For besides that it seems that this law, among the Romans, was a consequence of the custom which they had, to give always something to the witnesses of a testament, as a recompense for the favor they did in bearing witness, which nevertheless would extend only to very small legacies,[a] the liberty of taking indifferently for witnesses legatees in considerable sums seems contrary to the general rule, that no one can be a witness in a case where his interest is concerned, as has been explained in its proper place;[b] neither would our usage approve the procuring of witnesses with money: for although the integrity of witnesses to a testament would not be liable to suspicion for having received some acknowledgment, as would be the integrity of witnesses that bear testimony in other matters, for which testimony it is prohibited by the Roman law, as well as by ours, to take or give any thing,[c] yet it is not decent that we should purchase with money witnesses to a testament. It is because of these considerations, and of the rule which requires that no man bear witness in his own affair, that in many customs we find it expressly ordained, that legatees, and others interested in the testament, cannot be witnesses to it. And although there be this difference between the customs and the written law, that in the greatest part of the

[a] *V. d. l.* 14, *D. de reb. dub.*; — *l.* 22, *C. de test.*

[b] See the sixth article of the third section of *Proofs*.

[c] *L.* 1, § 1, *D. de leg. Cornel. de fals., et de senat. Libon.*

customs there is required only the presence of two witnesses, with a notary public, to make a testament valid, whereas seven witnesses are required by the written law, it is so easy a matter everywhere to find witnesses, that there is no occasion to engage them to it by legacies, or other advantages. And it might even happen more readily in the provinces which are governed by the written law, than in the customs, that a testator should exhaust his estate, whether by a testament, or even by a codicil, in giving many considerable legacies; and therefore it would seem to be of too great a consequence to admit the testimony of legatees indifferently. And since the validity or nullity of the testimony of legatees ought not to depend on particular circumstances, so as to leave it to the discretion of the judge to admit or reject it; and since it would be necessary to have a fixed rule, which should either admit or reject without distinction the testimony of all legatees; it would seem more just to reject their testimony, since there can be no inconvenience in it, and there might be some in admitting it; and besides, it is just that, if the testator will deprive the heirs of blood of what they have a natural right to, he ought to take proper measures for doing it.

X.

3061. *Nor his Children, Father, or Brothers.* — The same reason which makes the testimony of the heir or executor to be rejected is the cause, likewise, why we do not receive the testimony of his children, his father, or his brothers; for the testament being the affair of the heir or executor, it is necessary to have other witnesses to it than persons who are so nearly related to him, and who of themselves may be interested in the validity of an institution which may in several ways turn to their advantage.[n]

Remarks on the Preceding Article.

3062. Although the text cited is restrained to children that are not emancipated, who are still under the authority of the same father, yet it seems that this distinction would not be agreeable to our usage. And if the rule did not extend to children that are emancipated, as well as to those who are not, it might very easily happen that, since, by the rule which shall be explained in the twelfth article, several witnesses may be taken out of the same

[n] § 10, *Inst. de testam. ordin.*

family, all the witnesses, or the greatest part of them, should be the father, the children, or brothers of the heir or executor.

3063. If the witnesses were uncles, first-cousins, or other near relations of the heir or executor, would their testimony be received? It seems that, the law having made mention only of brothers, and of brothers only who are not emancipated, it has not rejected the testimony of other near relations. As to which matter, we may take notice of a difference between the effect of the proof by witnesses in an inquest, or in an information, and the effect of the proof by witnesses in a testament, in a donation, in a sale, in a transaction, or other contract. In inquests and informations, there is often only the bare faith of the witnesses which makes the proof; and therefore they reject in them the witnesses who are relations, as has been explained in the eighth article of the third section of *Proofs*. But in testaments, and in contracts, the principal proof consists in the writing signed by the persons who make the said acts, if they can write, and by the notary; so that the proximity, which in inquests and informations makes the testimony of relations to be rejected, seems not to be of the same consequence in testaments, or in contracts. But if all the witnesses to a testament were uncles, or cousins-german of the heir or executor to a testator, who could neither read nor write, would the validity of the said testament be without dispute? It would seem to be so by this law, which rejects only the testimony of brothers; and, on the contrary, it would seem to be otherwise by the general rule, which rejects the testimony of near relations; and in this case, the will of the testator not being proved by his sign manual, it is the more necessary that the fidelity of the witnesses should be unexceptionable. So that this is a difficulty which deserves to be adjusted by some rules, unless we might extend to it that of the ordinance (1667, tit. 22, art. 11) which rejects the testimony of relations. But this ordinance relates only to inquests, and excludes from giving their testimony in them even children of second-cousins.

3064. We may likewise remark, on the same subject, another difference between testaments and contracts, which consists in this, that in contracts the parties are present, and that their mutual consent is sufficiently proved by their presence and signature, if they are persons that know how to write, or by the signing of the notaries; so that the witnesses are not very necessary, unless the truth of the contract be called in question. But in testaments the

heirs of blood, who are the parties concerned, are not present, and the testator disposes of his effects by himself as he thinks good; which the law does not allow him to do, unless he observes much greater formalities than those which are sufficient for the proof of contracts. Thus, it seems to be agreeable to the spirit and intention of the law, that the fidelity of witnesses to a testament should be free from all manner of suspicion; and that the motive of the law, which requires a greater number of witnesses in testaments than what is necessary for any other proof, seems likewise to demand that the fidelity of the witnesses should not be liable to suspicion by reason of their being too near of kin to the heir or executor; as to which matter, it is to be wished that there were some fixed and certain rule.

XI.

3065. *The Father, Children, and Brothers of the Testator cannot be Witnesses.* — Seeing the testament is the affair of the testator, as well as of the heir or executor, the father, the children, and the brothers of the testator cannot serve as witnesses to his testament. And in this matter is rejected the domestic testimony of those persons who compose all of them together only one family.[o]

XII.

3066. *Many Persons of the same Family may be Witnesses.* — Several persons of one and the same family may be witnesses to a testament. Thus, the father and several of his children may render this office to a testator;[p] for if they are all equally capable of this function, their relation among themselves is no obstacle to it.

XIII.

3067. *A Testament may be made at any Hour.* — There is no hour unseasonable for making a testament, and it may be made at all hours either of the day or night.[q]

[o] § 10, *Inst. de test. ordin.*; — § 9, *Inst. de testam. ord.* Since all the dispositions of testaments are to the prejudice of the lawful heirs, it is not very natural that a testator should call to be witnesses to his testament those persons whom he designs to exclude from his succession. But if it should happen that a son should complain of the testament of his father, to which his brothers, who had great advantage by the said testament, had been called to be witnesses, the rule, with respect to him, would be just. But if the next heirs were brothers to the testator, and had been witnesses to a testament of their brother made after the death of their father, it would seem that they ought not to complain of a testament which they had approved of in this manner.

[p] § 8, *Inst. de test. ordinand.*; — *l.* 22, *D. qui test. fac. poss.*

[q] *L.* 22, § 6, *D. qui test. fac. poss.*

XIV.

3068. *Different Formalities for Divers Sorts of Testaments.* — Of all the rules which we have just now explained, the first two belong to testaments that are made in the ordinary way, where the testator declares his will in presence of all the witnesses; and all the other rules are common to all the kinds of testaments. We shall now, in the next place, explain the formalities peculiar to each of them.[r]

XV.

3069. *Military Testaments.* — Officers of the army and soldiers who are actually in an expedition, and not in a condition to observe all the formalities which the law requires in testaments, are relieved from observing those which their present state does not allow them to comply with. And they may declare their will in such manner as the conjuncture in which they happen to be makes it possible for them to do it, provided that their intention appears by good proofs. And it is this kind of disposition which we call military testaments; which subsist, or do not subsist, according as the circumstances of the time and of the place give them occasion or not to use this privilege, and according as the formalities which are there observed may be sufficient to establish their validity, by the proof which results from them of the intention of the persons to whom these kinds of testaments are permitted.[s]

Remarks on the Preceding Article.

3070. The favor of military testaments is agreeable to our usage, confirmed by the edicts of 1576, art. 31, and that of 1577, art. 32, which being made for the pacification of the troubles, did confirm the military testaments which had been made on one side or other, pursuant to the disposition of the law. These are the terms which are used, that is to say, after the manner in which it was allowed to make these testaments by the Roman law.

3071. We could have wished to have been able to set down more distinctly and exactly the rule explained in this article, and to

[r] In order to know the validity of the several sorts of testaments, it is necessary to examine each kind of testament according to the formalities that are peculiar to it.

[s] *L.* 1, *D. de testam. milit.*; — *l. un. D. de bon. poss. ex test. mil.*; — *l.* 24, *D. de testam. milit.*; — *l.* 40, *eod.*; — *l.* 17, *C. eod.*; — *Inst. de milit. test.* The reader will be able to judge, by the remarks on this article, why we have thought it proper to cite all these texts here.

mark how far the dispensing with the formalities in military testaments ought to extend; but it was not possible to fix a certain form to be observed in them, and without which these kinds of testaments should have no effect; for we have no rules in this matter which determine what ought to be the form of military testaments. And the rules of the Roman law arising from the texts cited on this article, and from some others, are so indefinite, that it may be said that our usage would not receive them without distinction. Thus, for example, it would seem that we should hardly confirm a testament which a soldier had written upon the sand with his sword, although such a testament is approved in the 15th law, *Cod. de test. milit.*

3072. In this uncertainty of the law concerning this matter, we may reduce all sorts of military testaments to three kinds. The first is of those that are not in writing, and which he who is instituted heir or executor, or the legatees, should pretend to prove by witnesses to whom the testator had declared his will. The second kind is of a testament written and signed with the testator's hand, whether it be in the form of a testament or of a memorandum containing his intentions, or written by another hand and signed by the testator. And the third sort is of a testament reduced into writing in the presence of witnessess.

3073. As to the first of these three kinds of testaments, which was used under the Roman law by all sorts of persons, as has been remarked in the preamble of this section, it would seem that it ought not to be received, because of the inconveniences arising from the facility of forging a testament of this kind; and that it would be contrary to our usage, founded upon the ordinances that have been taken notice of in the preamble.

3074. The second kind of a testament, written and signed by the testator, or written by another hand and only signed by him, has not the same inconveniences in it. For the writing is a sort of an authentic proof in its own nature, and which would be sufficient to oblige a person even beyond his estate. So that if a military testament ought to be dispensed with as to the forms, it would seem to follow from this principle that it may be sufficient to observe therein a formality which of its own nature is a perfect proof that he who writes and signs any act wills and approves that which he has signed; and this is such a proof as suffices in many places for ordinary testaments.

3075. As to the third manner of a military testament reduced

into writing in the presence of witnesses, there may happen two kinds of difficulties in it. One is, to know what number of witnesses may be sufficient in this testament; and the other is, whether the witnesses alone are sufficient, without a public notary, vicar, or curate, or some other public officer.

3076. As to the ordinary number of witnesses, the law dispenses therewith, but does not determine how many are absolutely necessary. *Quamvis ii neque legitimum numerum testium adhibuerint.*[a] Ought there to be five witnesses in the places where seven are required in any other testament besides a military one? or would two be sufficient in all places, as they are in many? The same reason which we have remarked on written testaments seems to prove that two would be sufficient, seeing that number suffices regularly to make a proof.[b]

3077. As for the other difficulty, whether the presence of a notary, or any other public person, be necessary, it would seem that since, in proofs by witnesses, whether it be in inquests for civil matters, or informations for crimes, it is necessary that the witnesses do give their testimony in the presence of the judge, so likewise it should be necessary that the testimony of those who are called to be witnesses to a testament should be in the presence of a public notary, curate, or vicar, or some other person exercising these functions, unless that the testament were signed by the testator: for otherwise it would be as easy to find out two witnesses to sign a writing which might be easily forged, as to find witnesses to depose to a will that is not written.

3078. We do not pretend to give here these remarks for rules, but only as reflections upon the principles on which the law touching this matter seems to depend, and to give a reason why we have conceived this article in general terms, without marking precisely what are the formalities required in military testaments. For on one side, seeing these testaments are in use with us, it was necessary to take notice of the rule concerning them; and on the other side, we could not pretend to fix the formalities required in them, since that cannot be done but by a law; and it were to be wished that some provision were made therein.

XVI.

3079. *Of a Testament made in the Time of a Plague.* — The par-

[a] *Instit. de milit. testam.*

[b] See the thirteenth article of the third section of *Proofs*.

ticular hindrances which may happen to testators, and which may make it impossible for them to observe the formalities required in testaments, are not sufficient to dispense with the observance of them, and to make the testaments valid where they are wanting, for this pretext would have two mischievous consequences. But in case of the common calamity of a plague, where the just fear of danger is an invincible obstacle to the formality of bringing together the witnesses and the testator, the law dispenses therewith; and it is sufficient, without assembling the witnesses together, to communicate to them separately the will of the testator, and to make them sign it likewise apart. But as to the number of witnesses, the time of a plague does not dispense therewith.[t]

Remarks on the Preceding Article.

3080. Although the text cited marks precisely enough, that those who make their testament in a time of plague are relieved only from the formality of assembling the witnesses together, and not as to their number; yet several interpreters have been of opinion that five witnesses were sufficient in these sorts of testaments, and that some other formalities might be dispensed with therein; which has occasioned several lawsuits. But we have thought proper to fix this rule in the sense of the law; for when the disposition of a law appears to be certain and precise, it wants no interpretation: and it is not to interpret a law, but to make a new one, to dispense with the number of witnesses which the law has not dispensed with; although nothing would have been more natural and more necessary than to have expressed therein the liberty of making a testament with five witnesses, if it had not been judged necessary to have seven. The giving way to such interpretations, according as every one might imagine to be just, would take away all force from the rules, and would throw every thing into the greatest uncertainty. It is enough to give unto equity that extent which the sense and spirit of the law might require; especially when it concerns arbitrary laws, and those which have regulated the precise formalities which are to be observed in testaments.* For there is much less inconvenience in not favoring testaments contrary to the rules which prescribe the formalities of them, than in slighting these forms; seeing in general the

[t] *L.* 8, *C. de testam.*

* See the fourth article of the second section of the *Rules of Law.*

nullities of testaments have no other inconvenience in them than to leave things in the natural order, which calls the heirs of blood to the successions, and to oblige the testators to take their measures aright, when they shall have a mind to change the said order.

XVII.

3081. *Secret Testaments.* — The great consequence it is of to testators, and to their families, that the dispositions which they may make by their testaments should remain secret and unknown to every body besides themselves till after their death, if they desire it, has given occasion to the inventing of a sort of testament which has this effect, and where the witnesses give a certain testimony to the will of the testator, although the contents of the will are unknown to them. And it is this sort of testament that is called private or secret; the form of which is after this manner, that the testator who knows how to read and write, or only to read, writes his testament himself, or gets it written by another, and he reads it over, and finding all the contents thereof to be conformable to his intentions, he presents this writing, folded up and sealed, to a public notary, and to seven witnesses assembled together at the same time, declaring to them that that is his testament, but without suffering them to read it, or telling them what are the contents of it; and having signed it in their presence upon the back, or upon the cover, if he knows how or is able to sign, he gets the witnesses or the notary to sign it; observing what has been said in the first article with respect to the testator and witnesses who cannot or are not able to sign.[u]

Remarks on the Preceding Article.

3082. Although the last words of the text cited seem to include the testators who cannot read, yet we have not thought fit to give them this sense; and that upon two considerations. The first is, that these words, *si literas testator ignoret*, being followed by these, *vel subscribere nequeat*, they may be naturally understood of him

[u] *L.* 21, *C. de testam.* In this article we have made use of the words *folded and sealed*, which are the same with those in the text. For although it would seem by the following words of the text, that it is enough if the testament is folded up or put under a cover, yet it is usual to seal it. And it is necessary so to do when the testament is put into a cover signed by the notary and the witnesses; for otherwise it would be easy to put another testament under the same cover.

who cannot write, although he can read. And taking them in this sense, this text may be applied to two cases; one, where the testator does not know how to write, although he knows how to read; and the other, where the testator can write, but is hindered from signing by some indisposition, which is pointed at by these words, *vel subscribere nequeat.* And since it is said in the text, that the testator may get his testament written by some other person, this clause shows clearly enough that it is not necessary for the testator to know how to write, provided he can read. The second consideration is, that there would be too many inconveniences in confirming the secret testaments of persons who cannot read, since it may happen that the person who writes their testament for them may abuse the trust that is in him, and write things quite different from their will; and it might be said that such a testament would be without any proof, for the testator himself would not be perfectly sure that it was his will which had been written, and the witnesses would have no manner of knowledge of it. Thus, such a testament would be contrary to the spirit and intention of the laws. For they require formalities in testaments for no other reason but to give a perfect assurance that what they contain is the will of those who make them. It is true, that a testator who knows neither how to write nor read might choose for the writing of his testament a person of such integrity, that there might be no manner of doubt that his will was written very faithfully; but there would still remain the consequence of the inconveniences for those persons who could not make or had not made so good a choice; and, in general, such a testament as this would be without any manner of proof, since it would depend on the fidelity of one only witness, that is, of the person who had written it.

3083. Seeing there are deaf and dumb persons who know how to write, there is nothing hinders why they may not make their testament after the manner explained in this article.

XVIII.

3084. *The Manner of Opening a Secret Testament.* — Since the proof of a testament made in the manner explained in the foregoing article is drawn from the declaration that the testator has made to the witnesses, that his will is contained in the writing which he produced to them, it is necessary for this proof that, after the death of the testator, the secret writing in which the testament ought to be contained should be put into the hands of the judge

that he may open it, after the witnesses and notary have been summoned before him to acknowledge their handwriting, and to bear testimony that it is the same writing which the testator declared to them to be his testament. And after it has been verified in this manner, it is then opened.[x]

XIX.

3085. *Verification of the Signatures before the Opening.* — If any of the witnesses had not signed, or if some of those who did sign are either dead or absent, the testament ought to be verified and opened in the presence of such of the witnesses as are to be found, and who have signed it, and of the notary, if he is not dead or absent. And if either the notary or some of the witnesses cannot appear before the judge because of some lawful impediment, such as sickness, the verification with respect to them should be made in the place where they are. But if all of them are either dead or absent, and it is necessary to open the testament without delay, the judge may call before him some persons of probity who are well acquainted with the handwriting of the notary and witnesses, and after proof made of their handwriting he may open the testament. And this verification may afterwards be confirmed, by getting the notary and witnesses who had been absent when the testament was opened to own and acknowledge their own hands.[y]

XX.

3086. *Testament of a Blind Man.* — Although blind men can neither write nor read, nor see the persons who are present at the making of their testament, they may, notwithstanding, make a will, as well as other persons who can neither write nor read; for they may signify their will and get it put down in writing, and declare, in presence of seven witnesses and a notary, that what they have got reduced into writing, and which shall be read in the presence of the witnesses and notary, is their testament; which shall have its effect, being signed by the witnesses who are able to sign, and by the notary. And if there are witnesses who cannot or are not

[x] *Ll.* 4 *et* 5, *D. testam. quemad. aper.*

[y] *L.* 6, *D. testam. quemadmod. aper.*; — *l.* 7, *eod.* We have taken no more of this seventh law than what agrees with our usage, which does not easily dispense with the appearance of the witnesses; and this last text is to be understood only of the case where the witness can by no means appear before the judge.

able to sign, the notary shall make mention of it, as has been said in the first article.[z]

XXI.

3087. *A Sort of Testament fit for all Persons.* — All persons who are capable of making a testament may make it by writing it themselves, or getting it written by whom they will, and declaring, in the presence of a notary and seven witnesses who are under no incapacity of performing this function, that the writing which shall be read in their presence, and in presence of the testator, is his testament, and signing it himself, and getting it to be signed; as has been said in the first two articles. And it is this sort of testament that is the most common, and which may suit the blind, the deaf, and the dumb, and those who know neither how to write nor read.[a]

XXII.

3088. *The Testament is Null if it wants any of the Formalities.* — We may discern by the rules explained in this section what are the formalities necessary in the several sorts of testaments, and consequently what are the defects which may render them null. And there remains only to observe, as a last rule concerning these formalities, that every testament in which any of the formalities prescribed by the laws is wanting ought to be annulled; since otherwise it would be to no purpose to ordain them.[b] Thus, a testament would be null if it had only six witnesses in places where seven are required, or if it was not signed by the testator or by the witnesses who could sign. And the favor of the persons who are called to the succession or to a legacy is of no consideration at all to dispense with the formalities; for it would be necessary in this case to have an express dispensation from the laws; and they have, on the contrary, expressly declared, that the prince himself can receive no benefit by a testament that is not made in due form of law.[c]

[z] *L.* 8, *C. qui test. fac. poss.* We see in this text the two ways of making a testament in writing or without writing. But seeing by the usage in France all testaments ought to be in writing, and in presence of a notary, blind men may with much more reason make their testaments after the manner explained in this article.

[a] See the texts cited on the first and second articles.

[b] *L.* 1, *D. de injust. rupt. irr. fact. test.*

[c] *L.* 7, *C. qui test. fac. poss.*; — *l.* 3, *C. de testam.*; — *l.* 23, *D. de legat.* 3.

Remarks on the Preceding Article.

3089. Some interpreters have been of opinion, that the rule explained in this article ought to be dispensed with in legacies left to pious uses, and that they ought to subsist even in a testament that has only two witnesses, and even although one of the two witnesses was only a woman. And they have likewise extended the favor of these kinds of legacies so far as to make testaments valid that are null by reason of other defects, much more essential than formalities. But how great soever the favor of legacies for pious uses may be, yet, the laws not having excepted them from this rule, they are necessarily subject to it, as well as other legacies that are as favorable, such as legacies to servants, to poor relations, or to other indigent persons, or legacies left in consideration of restitutions which the testator thought himself bound to make. The liberty of making such exceptions to rules exceeds the bounds of interpretation; and there would arise too many inconveniences from this license, which serves only to multiply lawsuits, of which we have store enough from other sources. So that it seems more just and more natural to keep to the law, and to prefer to the liberty of breaking in upon it the necessity of having fixed rules, and to wait till a provision is made by some other law in favor of legacies to pious uses, if it is necessary; and the rather, because testators, if they are afraid lest some nullities should destroy the legacies which they have left in their testaments to pious uses, have two ways to provide against it; one, which is the surest way, is for themselves to execute their good intentions, and to give their charity in their lifetime, rather than to leave it to be taken after their death out of an estate which will be no longer theirs; and the other way is, to take good advice in making their testaments

SECTION IV.

OF THE CODICILLARY CLAUSE.

3090. *Definition and Use of the Codicillary Clause.* — Seeing the most skilful testators may sometimes doubt, and have reason to fear lest there be nullities in their testaments; as if any one of the witnesses should happen to be under some incapacity of bearing testimony, which the testator was ignorant of, or for other causes;

many testators therefore use this precaution, for the greater security of having their wills executed, to add to their testaments this clause, which is called codicillary, whereby they ordain, that, if their will cannot be valid as a testament, it may be valid as a codicil, or otherwise in the best form that it can be valid.[a] And this clause, expressed in a testament, hath this effect, that whereas were it wanting, and there should happen to be in the testament some nullity, it would not be valid even as a codicil;[b] this clause, being added to the testament, gives it the nature and validity of a codicil, provided that it have all the formalities necessary in codicils, and that, for example, if there were some witnesses whose testimony ought to be rejected, there should remain five, at least, whose testimony ought to be received; because, as shall be said in its proper place, five witnesses are necessary to a codicil.[c]

Remarks on the Preceding Paragraph.

3091. Although it is not said in the laws cited on this paragraph, that, to make a testament valid as a codicil, it ought to have the formalities requisite to a codicil; yet it cannot be doubted, that, if the formalities requisite to a testament are wanting, it ought to have those that are necessary to a codicil; because otherwise it would not be as a codicil that it would be valid. But it might be said, that, however defective the testament might be, it ought to subsist; which is neither equitable nor conformable to the spirit and intention of the laws, which have received this way of supplying the want of formalities in a testament; for these laws are not made to give testators the liberty of making their testaments valid, although they be defective in the forms, by saying only that they will have them to have their effect such as they are. But the principle of these laws is, that, since it is free for every person that can make a will to make it either in the form of a testament or of a codicil, it is consequently free for them to give to an act which cannot be valid as a testament the validity of a codicil, if it can have the effect of one. But this must agree with that other general principle in the matter of testaments and codicils, that in these two sorts of dispositions it is necessary to observe the formalities prescribed by the laws. From whence it follows, that no

[a] *L.* 3, *D. de testam. mil.*; — *l.* 41, § 3, *D. de vulg. et pupill. subst.*; — *l.* 8, § 1, *C. de codicill.*

[b] *L.* 1, *D. de jure codicill.*; — *l.* 8, § 1, *C. de codicill.*

[c] See the fourteenth article of the first section of *Codicils.*

act can be valid as a codicil, unless it has the formalities of one. Thus, since the use of the codicillary clause presupposes on one side the liberty of making either a testament or a codicil, and on the other side the necessity of making a disposition in due form, the said clause implies two intentions that the person has who puts it into his testament. The first, which is pure and simple, is the intention to make a testament; the other is conditional, that if this act, which he makes as a testament, cannot have the effect of one, it may be a codicil. And it is by this second will that the act, which without this clause would be a null testament, for want of the formalities necessary to a testament, will subsist as a codicil, provided that it have the nature of one, that is, that it have the formalities requisite to one; because these formalities, joined to this second will of the testator, make this act to be in effect a true codicil; whereas, if a testator, having a mind to make a testament without this clause, had called only five witnesses to it, or, having a mind to make a codicil, has called only four, he would have made neither testament nor codicil. For in the first case, having a mind to make only a testament, he would have made it null; and having no mind to make a codicil, it could not be said that he had made what he had no intention to make. And in the second case, the act which should be attested only by four witnesses would be neither testament nor codicil.

3092. It is upon these considerations that the invention of the codicillary clauses has been founded. And if their use were now-a-days limited to the giving the validity of codicils to testaments in which these clauses are expressed, this matter would be plain and easy. But the different provisions that we see concerning this matter in the Roman law, and the comments of interpreters, have occasioned a great deal of confusion and uncertainty in it, and have given rise to many difficulties, which for many ages past have occasioned many lawsuits in the provinces which are governed by the written law. And since it is impossible to understand aright these difficulties without an exact explication of all that is essential in this matter of the codicillary clauses, we shall endeavour, for the giving some light to it, to explain here the rise and progress of the use of these clauses, in order to discover in these sources the causes of the difficulties which perplex this matter, and the principles which may put an end to them.

3093. The origin of the codicillary clauses has been a natural consequence of the intricate formalities which the Roman law re-

quired in the making of testaments; and these formalities proceeded from the liberty they had at Rome to make a testament without writing.[a] For since it was necessary that the remembrance of the testator's will should be preserved without writing, and only by the fidelity of the witnesses whom he had called to be present at his declaring it; it was but reasonable not to suffer such a serious act to be made cursorily in the presence of two witnesses, met with by chance; and it was for this reason that it was ordained that there should be seven witnesses, citizens of Rome, called on purpose, and that they should be present at the making of the testament, and during the whole time of the act, and without interruption. And to make the testament more authentic, they added to these formalities, that the testator could not institute an heir or executor, or leave legacies, but by using certain expressions, and that the said dispositions in other terms should be null.[b] And although these formalities were less necessary in written testaments, yet they were observed likewise in them by a kind of tradition or custom, as well as in those which were made by word of mouth, and without writing, and which were called *nuncupative testaments;* for they kept the use of these two sorts of testaments, written and unwritten.

3094. Seeing, therefore, the number of witnesses, and these other formalities, made the way of making a testament very difficult, and that those who made their testaments with the greatest exactness might be easily deceived in them, an expedient was thought of to supply the want of formalities, by adding to the testament a codicillary clause. And the effect of this clause was given even to some testaments, where it was judged that the expressions of the testators might supply the want of it; and this gave occasion to several rules. For on one side we see, in some laws, that the defective testament cannot be valid as a codicil, but in the cases where the testator declares expressly that that is his intention. *Si non valuit (testamentum) ea scriptura quam testamentum esse voluit, codicillos non faciet, nisi hoc expressum est. L.* 41, § 3, *D. de vulg. et pupill. subst. Nisi id ille complexus sit, ut vim etiam codicillorum scriptura debeat obtinere. L.* 8, § 1, *C. de codic.* And this expression was so necessary, that it is said in one law, that the legacy even of liberty to a slave was null, if the nullity of the

[a] § *ult. Inst. de testam. ord.;* — *l.* 21, § 2, *C. de testam.*

[b] *V. Ulp. tit.* 1; — *l.* 15, *C. de test.;* — *l.* 26, *eod.;* — *l.* 21, *C. de legat.;* — *l.* 2, *C. commun. de leg.*

testament was not repaired by the expression of the codicillary clause. *Si pure non subsistit testamentum, in hoc nec libertates (cum non fuisse adjectum, ut prò codicillis scriptum valeret, proponas) recte datas constabit. L.* 11, *C. de test. manum.* But on the other side, there are other laws which give the effect of codicils to testaments defective in point of form, although the codicillary clause was not therein inserted. Thus, we see in a law, that a testator having declared in his testament that he had written it without the help of any lawyer to assist him in observing the formalities, choosing rather to follow what his reason dictated to him, than to subject himself to the trouble of a nice observation of all these formalities, and judging that if he erred in any one of them, yet the will of a person in his right senses ought to be held for just and lawful; it was decided that these expressions should have the same effect as an express codicillary clause. *Lucius Titius hoc meum testamentum scripsi sine ullo jurisperito, rationem animi mei potius secutus, quam nimiam et miseram diligentiam. Et si minus aliquid legitime, minusve perite fecero, pro jure legitimo haberi debet hominis sani voluntas; deinde heredes instituit. Quæsitum est, intestati ejus bonorum possessione petita, an portiones adscriptæ ex causa fidei commissi peti possunt? respondi, secundum ea quæ proponerentur, posse. L.* 88, § *ult. D. de legat.* 2. Thus, we see that other laws give the effect of codicillary clauses to expressions that mark the testator's desire that his will should be executed; as, for example, if it was said in a testament, that the testator desired it might subsist in whatever manner it could have its effect. *Ex his verbis, quæ scriptura pater-familias addidit,* τάυτην τὴν διαθήκην βούλομαι εἶναι κυρίαν ἐπὶ πάσης ἐξουσίας. *Hoc testamentum volo esse ratum quacunque ratione poterit; videri eum voluisse omnimodo valere ea quæ reliquit, etiamsi intestatus decessisset. L.* 29, § 1, *D. qui test. fac. poss.* Or if a testator had said, that, in case his dispositions could not be valid as a testament, he entreated those who should succeed to him as dying intestate to execute his intention. *Ex testamento quod jure non valet, nec fidei commissum quidem, si non ab intestato quoque succedentes rogati probentur, peti potest. L.* 29, *C. de fidei com.* It may be further added on the same subject, that we see in another law, that the bare consideration of the singular affection of the testator towards a legatee, and of the quality of a legacy that is favorable in its own nature, makes the codicillary clause to be supplied in a testament that is null, in order to oblige the children of the testator,

his heirs, to acquit this legacy. *In testamentum quod perfectum non erat, alumnæ suæ libertatem et fidei commissa dedit: cum omnia ut ab intestato egissent, quæsit imperator, an ut ex causa fidei commissi manumissa fuisset? et interlocutus est. Etiamsi nihil ab intestato pater petiisset, pios tamen filios debuisse manumittere eam quam pater dilexisset. Pronunciavit igitur recte eam manumissam: et ideo fidei commissa etiam ei præstanda. L.* 38, *D. de fidei comm. libert.*

3095. All these examples, and some others that are to be met with in other laws, have given occasion to the interpreters to supply in many cases the codicillary clause; and some of them, even those of the first rank, have been of opinion that this codicillary clause may be supplied in all testaments, as being implied in them, because it is inserted in the greatest part of them, and it is the intention of all testators that their wills should have their effect as much as is possible.

3096. These first remarks are sufficient to let us see from whence the use of the codicillary clauses has sprung, what has been the progress thereof, and that this progress was not made without having many lawsuits upon the bare questions, whether testaments in which are found some nullities may subsist; whether by the effect of any expression which may serve as a codicillary clause, or in consideration of the qualities of the legacies, or other circumstances. But besides these kinds of difficulties or questions, there are others of another sort, which relate to the effect that codicillary clauses ought to have when they are in testaments. And for the right understanding of the nature of these questions, we must, in the first place, remark what has been said in the preamble of the title of *Testaments* concerning the difference which is made in the Roman law between testaments and codicils; which consists in this, that in a testament one may institute an heir or executor, and give legacies, and that in a codicil one can only bequeath legacies, but not institute an heir or executor.[c] And we must likewise observe a second use of codicils in the Roman law, which consists in this, that although one cannot institute an heir or executor by a codicil, yet in it the testator may dispose indirectly of the succession, by entreating or requiring his next of kin, who has right to succeed *ab intestato*, to restore it to the person whom he names in the codicil; which hath this effect,

[c] *V.* § 2, *Inst. de codicill.*; — *l.* 2, *C. eod.*

that the next of kin, who is desired or required by a codicil to restore the succession to another person, is obliged to restore it to him, reserving to himself a fourth part of the estate which the law gives to heirs or executors who are overburdened with legacies and fiduciary bequests.[d] So that, according to the Roman law, one may and may not make an heir or executor by a codicil, which depends on the manner in which he expresses himself therein. For if the testator should make use of those terms which the Roman law calls *direct and imperative*, as when one says, *Titius hæres esto, that such a one be my heir or executor*, this kind of expression, which was proper only in testaments, would be of no use in a codicil. But if the testator in his codicil should make use of those expressions which the same laws call *oblique* or *indirect*, which are in terms of entreaty or request,[e] as if one should say, *I entreat my heir to restore my inheritance to such a one;* this turn of expression, which does not institute directly for heir or executor the person to whom the testator is desirous to leave his estate, but which is addressed to the heir to entreat him to restore it, makes a fiduciary bequest, that is, a disposition which he who expresses himself in this manner recommends to the faith and integrity of his heir at law, or next of kin, and which obliges him to execute this will.

3097. By the opening of this gap, which gave to these oblique or indirect words the virtue of making an heir or executor in a codicil, there remained no other difference between an institution in indirect terms by a testament, and this institution in indirect terms by a codicil, except that the heir or executor named in the codicil being to receive the succession from the hands of the heir at law, who is desired to restore it to him, he had only three fourth-parts of the estate,[f] whereas he that was instituted heir or executor directly by the testament had the whole. Thus, there might arise from all these principles a doubt whether the codicillary clause, being in a testament that is null, and which calls to the succession another than the heir of blood, could have the effect of making this testament to be considered as a codicil which should contain a fiduciary bequest of the inheritance: that is,

[d] *L.* 2, § *ult. D. de jur. codicill.*; — § 2, *Inst. de codicill. idem*; — *v. l.* 12, § 1, *D. de injust. rupt. irr. fact. test.*; — *l.* 2, *C. de codic.*

[e] Verba directa, § 2, *Inst. de codic.*; — verba inflexa, *l.* 15, *C. de testam.*; — verba precaria, *l.* 41, § 3, *D. de vulg. et pup.*; — *l.* 2, *C. comm. de legat.*

[f] See the fourth title of the fifth book.

whether this clause would give to the said testament the same effect that a codicil would have had, in which the testator had entreated his heir at law to restore the inheritance to the person that is instituted heir or executor in this testament that is null; or whether this clause ought to have no other effect than to make the testament valid as a bare codicil, which should contain no manner of fiduciary bequest of the inheritance, and whether it would make the testament valid only as to the legacies, and other particular dispositions that may be made by a codicil, since with respect to the inheritance there was wanting in this testament the expression of the entreaty to the heir at law to restore it to him that was instituted, in case the testament should be found null. But it was judged that the codicillary clause supplied the want of this expression. And we see in many laws that this clause had the effect of making the testament that was null to be considered as a codicil, which should contain the fiduciary bequest of the inheritance, and that the heir at law was obliged to restore it to him who was named heir or executor by the testament that was null, but which subsisted by virtue of the codicillary clause. And the said heir at law had only his fourth part of the inheritance, together with that other advantage regulated by the Emperor Theodosius, that the person who was instituted heir or executor by the testament which contained the codicillary clause was obliged to take his choice of one of the two ways in which he might demand the inheritance; the one, by founding his demand on the codicillary clause, and the other, by insisting on the institution contained in the testament. For if he had begun by making his choice of this second way, and the testament should appear to be null, he could not afterwards have recourse to the codicillary clause,[g] unless that the person instituted in the testament was a descendant or ascendant of the testator, the law giving to the heirs of this quality the right of having recourse to the codicillary clause, if the testament were annulled, provided that the said person instituted, who was in the line either of descendants or ascendants, was in the rank established by the said law.[h]

3098. In fine, we must observe on the principles of the Roman law touching this matter of the formalities of testaments, which were become so difficult and perplexed, and which had confined the expressions of the testators to certain terms, as has

[g] *L. ult. C. de codic.* [h] *D. l. ult. § 2, C. de codic.*

been already remarked, that the distinction of direct words and of words indirect, for the institution of an heir or executor, was abolished by the Emperor Constantine,[i] in the same manner as he had abolished the set forms for actions,[l] that is, certain words which those who were to make any demand in a court of justice were obliged to make use of, upon the penalty of losing what they had to demand. And the Emperor Justinian did likewise afterwards abolish the same distinction of direct and indirect words in legacies and fiduciary bequests, giving to these two sorts of dispositions the same nature and the same form.[m] From whence it follows, that these emperors had abolished that which formerly made the difference between a testament and a codicil, as to the manner of instituting an heir or executor in the one and the other. For that which made this difference was, that direct words were useful for instituting an heir or executor in a testament, and that the same words were altogether useless for making an heir or executor in a codicil. Thus, seeing the ancient law had permitted the institution of an heir or executor in a codicil by oblique and indirect words, it would seem that, if after these laws there had happened a lawsuit, in which the question had been to know whether the institution of an heir or executor in direct words in a codicil could be valid, he who, being instituted heir or executor in this manner, should have pretended that this institution ought to subsist, would not have argued amiss, if he had said, that truly, according to the ancient law, his institution was null, because it was in direct terms in a codicil; but that, since by the same ancient law it would have been valid if it had been in indirect words, it ought now to have its effect, after these laws had abolished the difference between these direct and oblique expressions, without reserving the use of indirect words for codicils. And if this cause had been argued before the Emperor Constantine, in all appearance he would either have given it in favor of the person that was instituted in this manner; or, if he had had a mind to preserve the distinction between the testaments and codicils, as to the institution of an heir or executor, he would have abolished the institution of an heir or executor by a codicil, in whatsoever terms it had been made; or, in fine, he would have made a restriction to his law, and have declared the use of indirect words to be necessary in the institution of an heir or executor

[i] *L.* 15, *C. de testam.* [l] *L.* 1, *C. de formul.* [m] *L.* 2, *C. comm. de legat.*

by a codicil; which does not seem to be very agreeable to the spirit and intention of his law, seeing it abolished the difference between the two sorts of expressions direct and oblique.

3099. It is true that it does seem that this sense has not been given to that law of Constantine, seeing the compilers of the Digest and Code have inserted therein several laws which preserve this ancient law of the necessity of indirect words to make an heir or executor in a codicil. But it is known that they have inserted there a great many other laws which ought to have been left out, if care had been taken not to insert any thing that had been changed. And whatever sense we give to this law, there remains always in the laws relating to this matter, as well as others, a great deal of confusion, uncertainty, and obscurity.

3100. We could have wished to have been able to abstain from making here all these remaks, and to have excused ourselves from explaining all these particular niceties of the Roman law, since they seem not to agree with our usage, which demands rules that are more simple and more natural. But, seeing these niceties are the sources of the matter of codicillary clauses which are in use in many provinces, and that they contain the principles of the law concerning these clauses, it was necessary to explain all these particulars, in order to discover perfectly the nature and the difficulties of the questions that arise in this matter.

3101. These questions, as has been already said, are of two sorts; some of them relate to the effect that codicillary clauses ought to have; and the others concern the distinction of dispositions which may or may not have the effect of a codicillary clause. Thus, for a first example of the difficulties which concern the effect of codicillary clauses, there are some interpreters who have made it a question, whether one who is instituted heir or executor by a former testament, made in due form, would be obliged to restore the inheritance to one that should be instituted by a second testament that is null, but having in it a codicillary clause, in the same manner as the heir at law would be obliged to do it; and in case that he should be obliged to restore it, whether he should retain the fourth part as the heir at law has right to do, or whether he should have nothing at all. Thus, for a second example, some interpreters have started the question, whether a codicillary clause in an undutiful testament would have the effect to oblige the son that is disinherited, and who had got the testament to be annulled, to restore the inheritance to the person who is instituted heir or

executor, reserving to himself his legitime, or child's part. And they have been of opinion, as to the first of these two cases, that the codicillary clause ought to make the testament that is null for want of formalities to subsist, leaving the fourth part of the estate to the person instituted by the first testament; and that, in the second case, the codicillary clause ought to make even the undutiful testament to subsist; and that although it were annulled, yet the codicillary clause obliged the son, who was unjustly disinherited, to restore the succession to the person instituted heir or executor by the said testament. And they have founded their decision of the first case upon the virtue of the codicillary clause, which they have judged to be of equal force to take away the succession from the testamentary heir instituted in a former testament made in due form, as well as from the heir at law. And as to the decision of the second case, they have founded it on the 115th novel of Justinian, chap. 3, because it is there said, that if, in a testament that is null by reason of the disinheriting or making no mention therein of the testator's children, there were some legacies, or some fiduciary bequests, *quædam legata vel fidei commissa*, they would nevertheless subsist, and must be paid, *dari illis quibus fuerint derelicta.* From whence these commentators infer, that, a general fiduciary bequest being more favorable than a particular one, this term of fiduciary bequest in this novel ought to comprehend the universal fiduciary bequest of the whole inheritance; as if this testator disinheriting his son had charged him, in case his testament should be annulled, to restore the succession to the person instituted heir or executor therein; and that therefore, if this son procures the testament to be annulled, he shall be bound to restore the inheritance to the said heir or executor, retaining only his legitime, or child's part, out of it.

3102. We see in these questions, and in the decisions of them by the said doctors, the use and the consequences of these niceties; and that in the second of these questions their interpretation goes on one side to an extreme hardship, against a son that is unjustly disinherited, and that on the other side it is contrary to the very letter of the said novel of Justinian, the natural meaning of which is in relation to legacies and particular fiduciary bequests, which are of the same nature with legacies; but has no relation to a universal fiduciary bequest of the whole inheritance, which he could not mean in that place.

3103. As to the other sort of difficulties, where the point in

question is whether the expression of the testator ought to have the effect of a codicillary clause, or whether it ought to have no such effect; as we have seen that some of the laws which have been remarked upon on this subject have given the effect of codicillary clauses to expressions which showed a strong desire in the testator that his testament should be executed, and that other laws have even confirmed legacies, in consideration of the persons of the legatees, which might render the bequests of the testator favorable: these examples have been the cause that there remains an indefinite liberty of giving the effect of codicillary clauses to dispositions that have nothing in them which expressly carries the sense of these clauses.

3104. It is easy to imagine, that according to these principles there ought to happen many questions concerning wills, which may be pretended either to have expressions in them that are equivalent to codicillary clauses, or that they ought to be excepted from the rules of formalities for particular reasons. And if the bare conjecture of a strong desire in the testator to have his will executed may have the effect of a codicillary clause, it is easy to supply the want of it for this reason in every testament, as the most able interpreters have been of opinion ought to be done, as has been already remarked. For it may be said with assurance, that every testator desires, as earnestly as he can, that his will should be executed. And, besides, there would be no inconvenience if the testaments which for want of some formality are null should have the effect of codicils, if they have the formalities necessary thereto.

3105. Neither does it seem to be anyways inconvenient, if the forms of testaments were the same in all places, whether they be to be made in the presence of one notary public and two witnesses, or of two notaries, which would make the use of codicillary clauses to be quite laid aside, as we see by experience in the customs which require no other formalities. For seeing no more are required than these few, and that they are essential, none of them ought to be omitted; and if there were only one single witness, instead of two, which are necessary, or only one notary, instead of two, without any witness, these nullities would not be done away with by a codicillary clause. So that of all the lawsuits which might arise on account of defects in point of form, and of these subtilties and various effects of the codicillary clauses, there is scarcely one ever heard of in the customs, and that through the

bare effect of this plainness and simplicity in the formalities of dispositions made in prospect of death, and without any manner of inconveniency attending it.

3106. Some persons may imagine, that seeing the customs do not permit the institution of an heir or executor, and that they knowing no other heirs besides those of blood, one ought not to give the name of testament, but only that of codicil, to dispositions in prospect of death that may be made in the customs; and that therefore the liberty of disposing of one's goods by a testament, being less in the customs than in the provinces which are governed by the written law, where heirs may be made by a testament, fewer formalities are there required. But it may be said, on the contrary, that there is more reason to multiply these formalities in the customs, than in the places which are governed by the written law. For besides that, in general, the dispositions which transmit the goods to others than the heirs of blood are odious in the customs, seeing one may, in some of them, dispose by will of all the acquests, and of all the movables, the person instituted heir or executor, who is called universal legatee, carries away all the goods, if there be only these two sorts. So that there would be as much, or rather more, reason to require many more formalities for testaments in the customs, than in the provinces which are governed by the written law. And we see, likewise, that some customs have invented another kind of formality, more troublesome in one respect than those of the Roman law, but, however, more proper to prevent more essential defects in testaments than that of the formalities. For in order to guard against importunities, and other evil practices on the weakness of testators, who make their testaments in their last sickness, those customs declare testaments null which have not been made before the death of the testator within a certain time limited by the said customs, as has been observed in other places.[n] And this precaution hath this effect, that whereas those who do not make their testaments till they are sick, and in fear of death, have not all of them that freedom of mind, or the firmness, that is necessary to make dispositions that are well concerted, and are exposed to the flatteries and importunities of persons who besiege them, and who often hinder those from admittance to them who might give wholesome

[n] See the preface to this second part, no. 7. See the fifth article of the second section of this title, and the remark that is there made on it.

advice, but contrary to their interest, those who make their testaments when they are in full strength of body and mind are not exposed to any one of all these inconveniences; and nobody can complain, that, if he will make a testament, the law obliges him, for his own proper interest, to take precautions which are both prudent and easy.

3107. It is not, therefore, the greater or the less liberty to dispose of one's goods by testament, that distinguishes the usage of the customs from that of the written law, in what relates to the formalities of testaments. And we know, likewise, that in some places, where the Roman law is observed with the greatest exactness, only two witnesses are required to a testament, and that by the canon law a greater number is not necessary.[o] But seeing in all places it is necessary that testaments, as well as all other acts, should be made with such formalities as may make a proof of the verity, and that that proof may be made many ways, by several sorts of formalities, it was free for those who made the laws to make choice of the said formalities. Therefore in the Roman law they had reason to require that great number of witnesses, and the other formalities which have been mentioned, to make proof of a testament which might be made without any writing, and the remembrance of which could not consequently be preserved but by the help of such precautions. Thus, on the contrary, in all the provinces of this kingdom, it being required that every testament should be in writing, this great number of witnesses is the less necessary; and we do not find any inconveniences in the places where two witnesses suffice for testaments, as well as for all other acts. But although it should be necessary that there should be seven witnesses to a testament, yet at least we might be without that distinction of the different ways of making heirs or executors, either by a testament in direct words, or by a codicil in terms of a fiduciary bequest. Thus, it would be an easy matter to remove all these difficulties by plain and simple rules, which should substitute, in the place of these troublesome and useless subtilties, the natural order of a uniform way of making dispositions; which would be agreeable even to the spirit of the Roman law, where it is owned that plainness and simplicity are characters essential to laws.[p] But if this truth is common to all

[o] *C.* 10, *de testam.*

[p] § 7, *Inst. de fideicom. hæredit.*; — § 3, *Inst. de legit. agn. succ.*; — *l.* 22, § 1, *C. de furt. et serv. corr.*

laws, it is more especially peculiar to those which concern matters in which the multiplying of rules may multiply inconveniences.

3108. We have made here all these remarks, and all these reflections on the codicillary clause, and on the different ways of making an heir or executor by a testament or by a codicil, in order to explain what it is that makes the difficulties in this matter, and to give a reason why we have inserted in this section one only rule of the nature and use of the codicillary clause when it is expressed, and why we have omitted to set down among the number of rules those which we meet with in the body of the Roman law, which do not appear to be so very natural, and which are so little agreeable to that plainness and simplicity that are essential to laws, and which are, on the contrary, very proper to multiply difficulties.

3109. But if any reader should be of opinion that we ought to have inserted here such of the said rules of the Roman law as are received in some of the provinces, we think that this may be enough to satisfy them that, in a matter that is so arbitrary, and where the rules of it are so full of difficulties, we have explained what is to be found relating thereto in the Roman law; seeing they have in these remarks what might have been reduced into rules, and that this way of treating a matter of this kind, explaining what are the principles thereof, and what the difficulties, may suit with the usages of all places, and not break in on any of them, but only shows the great occasion there is to have rules that are more plain and simple.

SECTION V.

OF THE SEVERAL CAUSES WHICH MAY ANNUL A TESTAMENT IN WHOLE OR IN PART, ALTHOUGH IT BE MADE IN DUE FORM, AND OF THE DEROGATORY CLAUSES.

3110. ALTHOUGH the use of derogatory clauses is a matter which comes within the order of those of this section, and that mention is made thereof in the title of the section, yet we have not thought fit to put down among the rules of this section any rule concerning these clauses; and that it would be sufficient to mark here their order, and to give the reasons that have obliged us to speak of them nowhere else but in this preamble.

3111. We call those derogatory clauses, which testators put in their testaments when they fear lest they should be obliged afterwards to make other dispositions against their will, upon considerations that may oblige them thereto, and are willing to annul the said dispositions beforehand, and to make those to subsist which they had made in the first testament. It is with this view that those testators who are desirous that their first testament should not be revoked by a second, put into the first testament a clause by which they ordain, that, if afterwards they should happen to make another testament, it may have no effect, unless it contain certain words which they express in the first, and which they put there for a mark, that, if they are repeated in the second, it shall subsist, and that it shall be null if it does not contain them. These clauses are called *derogatory*, because they derogate from the validity of the second testament, if they are not expressed in it. And it is no matter what these words are, nor whether they have any sense or not, no more than the watchword.

3112. We have thought fit not to insert among the rules of this section any thing concerning these derogatory clauses; because, although they are very much in use, yet they are altogether unknown in the Roman law; and those who first invented them have built only upon consequences drawn from some laws which have nothing in them that expressly countenances these sorts of clauses; and, on the contrary, the effect that is given them is altogether opposite to the principles and dispositions of the Roman law, which do not allow that we should deprive ourselves of the liberty of making new dispositions, and of changing or revoking the first whenever we please.

3113. The authors of the derogatory clauses have gone upon this, that it is said in one law,[a] that, if a testator had declared in the beginning of his testament, that he does not give to such a one that which he shall give in the latter part of his testament, *quod Titio, infra legavero, id neque do, neque lego;* the legacy left to such a person in the latter part of this testament would be null by the effect of this first will. From whence these doctors have drawn this consequence, that a testator may annul a second testament by such a clause as this in a former. They add upon the same subject what is said in another law,[b] that if a testator had said in his testament, *that if there were found therein two legacies*

[a] *L.* 12, § 3, *D. de legat.* 1. [b] *L.* 14, *D. eod.*

to one and the same person, his will was that there should be only one of them due, and that in the same testament he had left two legacies to one legatee, there would be only one of them that should subsist. And they likewise made use of an addition of Tribonian's to another text.[c] It is in the case where the testator having said in the beginning of his testament, *that, if in the sequel of it he should leave two legacies to one and the same person, there should be due only one of them*, and he had left several legacies to the same legatee, the law decides that they should be all due; because this testator could not put himself under the necessity of not being able to change his former disposition. But by this addition it is said that this legatee shall not have all those legacies, unless the testator has ordered it so by a second disposition in express terms, which derogates from the former. From whence these doctors have drawn this consequence, that when the testator annuls the second testament by a former, as by a derogatory clause, this second disposition remains null, unless the testator should declare that his will and intention is, that, notwithstanding the derogatory clause, his second will should be executed. But since the exception added to this law is an addition of Tribonian's, easy to be known by the style, it may be said that this law proves rather that the second disposition revokes the former. And this is likewise a certain principle in the matter of testaments, as shall be explained in its proper place.[d] And besides, this addition of Tribonian's has no relation to two testaments, to have the effect of annulling the second by a derogatory clause in the former; but it is limited to the making valid the first disposition of a testament which annuls other dispositions of the same testament, or of a codicil, which in the Roman law makes a part of the testament, and draws from it all its force.[e] Thus, this law, as well as the others which we have just now remarked upon, is in the case of one only testament which contains two opposite dispositions, one of which ought necessarily to hinder the effect of the other; which has no precise relation to the dispositions of two testaments made at different times. So that none of these laws prove that we may, by the Roman law, make a disposition in a former testament which shall annul those of a second. And, on the contrary, those very laws, and all the others that may have any relation to this

[c] *L.* 22, *D. de legat.* 3.

[d] See the first article, and the following articles of the fifth section.

[e] *L.* 2, § 2, *l.* 3, § 2, *D. de jure codicill.*

matter, prove two truths quite opposite to the use of derogatory clauses in a former testament to annul those which the testator might happen afterwards to make: one is, that it is always the last will which annuls the former, when it is contrary to them;[f] and the other is, that no man can deprive himself of the liberty to dispose, and to revoke former dispositions.[g] It is in conformity to these two principles, that it is decided in the sixth law, § 2, *D. de jure codicill.*, that if a testator, having declared that he desired that no regard might be had to any codicil he should make, unless it was written and signed with his own hand, should happen afterwards to make a codicil, which he had neither written nor signed with his hand, this codicil would nevertheless be confirmed, because, as it is said in that law, the last wills of testators derogate from the former, *quæ postea geruntur prioribus derogant.*[h] Thus, it may be said that the use of derogatory clauses is not agreeable to the spirit of the Roman law, nay, that it is directly contrary to it. And it has been so determined by one of the interpreters, who best understood the law relating to this matter.

3114. As for other reasons besides the authority of the laws, we see, on one hand, that the use of the derogatory clauses consists in giving to testators the means of making a second testament, which they would have to serve for nothing, after that they have made a former which they are desirous may be executed; that this second testament may serve to amuse the persons in whose favor it has been made, the testator thinking within himself, at the same time, that nothing is more remote from his intention than this second testament, which is already annulled beforehand in his mind. We know that there have been pagans that would not have had the conscience to make use of an expedient of this nature. But even although this expedient could be of any good use, yet it is not without a great many inconveniences: for it may happen that he who has a mind to engage a testator to make a testament in his favor may take his measures accordingly before any other testament has been made, and may get the testator to make a secret testament, sealed up, and put into his custody, and in which he may have procured a derogatory clause to be inserted, of which the testator perhaps is not capable to comprehend the consequence, or which he may have forgot; so that any second testament which

[f] Suprema voluntas potior habetur. *L.* 22, *D. de leg* 3.

[g] Nemo enim eam sibi potest legem dicere, ut a priore ei recedere non liceat. *D. l.*

[h] See the like decision. *L. ult. D. de legat.* 2.

he should make might be of no effect. And it might likewise so fall out, that the persons who should engage the testator to make a second testament, having already made a former with a derogatory clause in it, might get him to add in the second a clause which might derogate from the derogatory clause of the former, getting the testator to declare that he had forgotten the terms of the said clause, or to make use of other expressions which might render ineffectual the precaution of the derogatory clause in the former testament. It may likewise so happen, that a testator who is desirous, and that for good reasons, to change a former testament, may have forgotten that he had put in it a derogatory clause, as if the testament had been made many years before, or he had even forgotten that he had made any at all; and thus the second testament he should have a mind to make would be useless. It might likewise happen, that a testator had made a former testament out of some passion that had disgusted him with his relations, and had moved him to leave his estate to some stranger, who had taken the precaution to get a derogatory clause put into the testament; and that this testator should afterwards repent himself of it, and, being desirous to leave his estate to his nearest relations, brothers or others, he should make a second testament with this intention; but that he had omitted, either through forgetfulness or ignorance, to make mention of the derogatory clause of the former testament; so that the effect of the said clause would be in this case to prefer an unjust and angry will to a disposition that is most just and equitable. Thus, it may be said that this precaution of the derogatory clauses is much more inconvenient than it is useful; without reckoning the many lawsuits which the invention of these clauses has added to the great number of others, which are already more than the judges can well decide, and which disturb the peace and quiet of families.

3115. All these considerations have induced us to think, that, although it be true that the derogatory clauses are generally used, yet that we might, without transgressing the authority of the said usage, forbear setting down here any rule concerning this matter. And although there were no inconvenience in the use of the said derogatory clauses, yet this matter has two characters which exclude it from coming within the design of this book. One is, that it is no part of the Roman law; and that not only it is not a part thereof, but is directly contrary to it: and the other is, that it is no more a part of the law of nature. And besides, the remarks

which we have just now made contain all the principles of this matter.

ART. I.

3116. *A First Testament is annulled by a Second.* — Besides the want of formalities which may annul a testament, there are other causes which may have the same effect. And we may reckon as the first of them a second will of the testator who makes another testament. For as every testament implies the disposal of the whole estate, two different testaments cannot subsist together, but the second annuls the first;[a] as shall be explained in the following articles.

II.

3117. *Although the Second make no Mention of the First.* — Although the second testament make no mention of the first, yet nevertheless it revokes it by the bare effect of the will of the testator, who, being at liberty to change his dispositions to the moment of his death, declares sufficiently by those which he makes in his second testament, that his will is that the first should remain without effect.[b] But if in the second testament the testator makes only some additions, some deductions, and some alterations in the former, whether it be in the naming of the heir or executor, or in the legacies; whatever he confirms of the first testament shall have its effect as making a part of the second.

III.

3118. *Provided that the Second be in due Form, although it remain without Execution.* — A first testament made in due form cannot be annulled by a second, unless the same be likewise in due form; for otherwise this second will, having for its proof only an act that is null, would be null likewise, and would not have so much as the effect to revoke the former dispositions which should still be in being.[c] But if the second testament has all the necessary formalities, it is no matter although it remain without execution, whether it be that the heir or executor, and legatees, if there are

[a] § 2, *Inst. quib. mod. test. infirm.*; — *l.* 1, *D. de inj. rupt.* See the fourth article of the first section of *Codicils*.

[b] *L.* 4, *D. de adim. vel transfer. legat.*; — *l.* 1, § 1, *D. de bon. poss. sec. tab.* See the thirteenth and fourteenth articles.

[c] *L.* 2, *D. de injust. rup. irr. fact. test.*

any, renounce the right they have by it, or that they die before the testator, or that they are become incapable, so that this testament has no effect. For this second will, being in due form, does, nevertheless, annul the former. Thus, the testator dies without a testament, the first being annulled by the second, and the second failing to have its effect.[d]

IV.

3119. *A Testament which may subsist with fewer Formalities revokes a Former.* — We must not reckon in the number of testaments that would not be sufficient to revoke a former testament, those in which the laws dispense with a part of the formalities, such as military testaments, and those which are made in a time of plague. For if these testaments which want some formalities have those which are sufficient to render them valid, they revoke the former testaments.[e]

V.

3120. *A Testament in Favor of the Heir of Blood, attested by Five Witnesses, revokes the former which called a Stranger to the Succession.* — It must likewise be remarked on this rule, that we ought to except from it the case where the testator, having, by a former testament, named for his heir or executor another person than him who had right to succeed to him if he had died intestate, had instituted for his testamentary heir or executor his heir at law by the second testament; for in this case this second testament, although null, revokes the former, provided only that it have five witnesses, and the favor of the heir of blood makes it to subsist.[f]

VI.

3121. *The Birth of a Child annuls the Testament.* — A testament made with all the formalities is, nevertheless, annulled by the birth of a child whom the testator had not instituted his heir or executor:[g] for since the inheritance is due to the children, both

[d] § 2, *Inst. quib. mod. test. infirm.*

[e] *L.* 2, *D. de injust. rupt. irr fact. testam.* Although this text speaks only of the military testament, yet a testament made in a time of plague, according to the rule explained in the sixteenth article of the third section, will have the same effect, since it will subsist.

[f] *L.* 2, *D de injust. rupt. irr. fac. testam.; — l.* 21, § 3, *C. de test.* See, in the preface to this second part, no. 8, and the third article of the seventh section of this title.

[g] *L.* 1, *D. de inj. rupt. irr. fac. test.; — l. un. C. de ordin. judic.* See the fifteenth article touching *Legacies* in this testament.

by law and by nature, if they have not deserved to be disinherited,[h] the child which is born to the testator after the making of his testament is his heir. And it is presumed that the reason why he did not revoke this testament was because he was prevented by death.

VII.

3122. *Unless the said Child dies before the Testator.* — If in the case of the preceding article the child born after the testament should happen to die before the death of the testator, its father, the said testament would have its effect: for since it is the death of the testator that gives the testament its effect, and that at the time of the said death the cause which ought to annul the testament of this father would not be any more in being, nothing would hinder its validity. And all the dispositions thereof would be executed upon this just presumption, that the testator, not having revoked them after the death of the said child, had confirmed them.[i]

VIII.

3123. *The Testament in which the Children are omitted is Null.* — The testament of him who, having children, or parents if he has no children, makes no mention of them therein, is annulled with respect to the institution of the heir or executor; for he ought to have named them his heirs or executors; or, if he had a mind to disinherit them, he ought to have mentioned the reasons for which he did it,[l] as shall be explained in the second title.

IX.

3124. *The Unjust Disinheriting of Children annuls the Testament.* — If the testator who has children disinherit any of them without just cause, his testament will be annulled as to the institution of the heir or executor. And it would be the same thing if the testator who had no children had disinherited without just cause his

[h] *L.* 7, *D. de bon. damn.* See the preface to this second part, no. 3.

[i] *L.* 12, *D. de inj. rup. irr. f test.*

[l] *L.* 1, *D. de injust. rupt. irrit. fac. test.*; — *Nov.* 115, *c.* 3 *et* 4. See the following article and the sixteenth article, with the remark that is there made on it. This omission of the father or mother, who make no mention of their children in their testaments, is called in the Roman law *preterition*, distinguished from *disherison*, for in this the children are named and disinherited.

father or mother, or other ascendants,[m] as shall be shown in the second title of this book.

X.

3125. *The Institution is of no Effect, if the Testamentary Heir renounces.* — When the person who is instituted heir or executor by a testament renounces the inheritance, the institution of the testamentary heir having no effect, the next of kin is called in the place of him who was named by the testament.[n]

XI.

3126. *The Testament is annulled if the Testator dies incapable of making one.* — If he who had made a testament happened afterwards to fall into a state that renders him incapable of having heirs or executors, as if he happens to lose his right of naturalization, or is condemned to some punishment that carries with it a civil death, as has been explained in its place, and remains in that condition till his death, the testament which he had made before will be annulled. For since every testament hath its effect only at the moment of the death of the testator, he who at the time of his death cannot leave his goods to heirs or executors cannot by consequence leave any use of a testament from which nobody can reap any profit.[o]

XII.

3127. *The other Changes, or the Length of Time, do not annul a Testament.* — All the other changes that might happen between the time of making the testament and the death of the testator,

[m] *L.* 8, § *penult. D. de inoff. test.*; — *l.* 30, *D. de liber. et post hæred. inst.*; — *v. Nov.* 115, *c.* 3 *et* 4, and the sixteenth article of this section.

[n] *L.* 1, *D. de inj. rupt. irr. fact. test.*; — *l.* 181, *D. de reg. jur.* We have not said in the article, that the testament will be null without distinction as to all the dispositions it may contain, concerning which it will be necessary to see the nineteenth article, with the remark made on it.

[o] *L.* 6, § 5, *D. de inj. rupt. irr. f. test.*; — *d. l.* § 6. See the sixteenth article of the second section of this title, the texts which are there cited, and the remarks made thereon, and the twentieth article of this section.

This article is to be understood only of the case mentioned in it, where the testator is at the time of his death incapable of having heirs or executors; for if he was only incapable of making a will, as if after having made his testament he had professed himself a monk, or was fallen into a state of madness, or under some other infirmity which rendered him incapable of making a testament, yet his testament would nevertheless have its effect, because he would not be incapable of having for his heirs or executors those whom he had made choice of when he was capable of doing it.

even those which might make us presume some change of his will, would not annul it. And although there may have passed a great number of years in the said interval, and during that long time the testator's estate had been much augmented or diminished; or some of the legatees were dead; or the person whom he had chosen to be his heir or executor, because he was poor, and had many children, should happen to be rich, and to have no children; or there had happened other changes of the like nature; his testament would nevertheless be executed, unless he had revoked it, either by some contrary disposition made in due form, or in the manner explained in the twenty-first article. For it ought to be presumed that he had persevered in the same will, having made no change in his testament, being able to have done it, and that his intention was that this testament should be executed in what manner it could, according to the condition that matters should be in at the time of his death.[p]

Remarks on the Preceding Article.

3128. We have not set down in this article the words that follow in the text cited, that if the testator revoke his testament, either in the presence of three witnesses, or by an act in a public registry, this revocation, together with the lapse of ten years after the testament, will make it to be null. *Sin autem testator tantummodo dixerit*, non voluisse prius stare testamentum, *vel aliis verbis utendo contrariam aperuit voluntatem, et hoc vel per testes idoneos non minus tribus, vel inter acta manifestaverit, et decennium fuerit emensum; tunc irritum est testamentum, tam ex contraria voluntate, quam ex cursu temporali.* And instead of this way of revoking a testament, we have put down only in the article, that the testator may revoke it, either by an act made in due form, or in the manner explained in the twenty-first article, that is, by tearing, razing, or defacing it. For it seems that that which in the Roman law made the use of those other ways of revoking a testament necessary, either by an act in the public registry, or by a declaration in presence of witnesses, was, that testaments, as well as all other acts, might be made without any writing;[a] and that therefore, as testaments made after this manner did subsist in the memory of the witnesses, a contrary act was necessary to annul those that

[p] *L.* 27, *C. de testam.*

[a] See the twelfth article of the first section of *Covenants*. *Ll.* 9, 10, *Cod. de fide instr.*; —*l.* 21, § 2, *Cod. de testam.*; —*l.* 26, *eod.*

were not written. And it was perhaps for the same reason, in that testaments did subsist without writing, that before Justinian's reign the laws which that emperor abolished by the law quoted on this article had regulated that a testament should be null after ten years from the day of its date.[b] Which may have been founded upon this, that the memory of a testament which was not written could not be so easily preserved after so long a time, whether because of the death of all the witnesses, or some of them, or their forgetfulness. And this revocation of testaments by the course of ten years may have been extended to those that were written, in the same manner as they extended the formalities of testaments that were not written; as has been remarked in other places.[c] But Justinian did not content himself with the bare effect of the space of ten years, to revoke even testaments that were not written; and he ordained, without making any distinction by this law, that to revoke a testament there should be necessary both the course of ten years, and likewise a declaration of the testator in the presence of three witnesses, or an act in the public registry: from whence it follows, that, without the circumstance of this time, an act before three witnesses would not be sufficient, and that it would be necessary to have an act more authentic to revoke the testament; so that it would seem that Justinian looked upon the revocation of a testament as an act of the same nature with the making of a testament, because it implies a disposition of the inheritance: so that one might conjecture from this law, that, to revoke a testament within the ten years from its date, the same number of witnesses should be necessary as in making a testament. And as to the manner of revoking a testament by the effect of time, as by this law of Justinian the time alone is not sufficient to annul it; so it is still less sufficient with us, where every testament ought to be in writing. But although every testament ought to be in writing, yet a contrary act is not always necessary to revoke it, for the testator needs only to tear or cancel his testament, so that the use of an express revocation cannot be necessary, except in the case where a testator cannot have the original testament in his power, either by reason of absence, or for other causes; and in this case the difficulty would remain, to know whether it would be necessary to have an act with the same number of witnesses that are required to a testament, as it seems to follow from this law of Jus-

[a] *V. l.* 6, *Cod. Theodos. de testam. et codicill.*

[b] See the preamble of the third and fourth sections.

tinian, who is not contented with three witnesses, except in the case where the ten years are elapsed after the date of the testament. But as we have seen in the fifth article, that a testament with five witnesses in favor of the heir at law annuls a former testament in which a stranger was instituted heir or executor; and that he who has a mind to revoke his testament without making another cannot but know that, if he die without a testament, he leaves his estate to his next of kin; so therefore five witnesses ought to suffice to make the revocation of his testament valid. And this revocation ought to have the same effect as if he instituted his heir at law by a second testament. For one may say of him who revokes his testament without making another, that he institutes for his heir or executor him who ought to succeed to him if he died intestate, not by an institution in express terms, but which is tacit in the expression, and express in the intention; and likewise with this advantage in favor of the said heir at law, that he is willing to leave him the estate without any diminution by legacies or other bequests. And if this revocation were made in a place where only two witnesses are required to a testament, the same number would be sufficient; since in testaments, and other acts, we ought to observe the formalities that are used in the places where they are made; as has been remarked on the first article of the third section.

3129. But if there were only two witnesses to such a revocation, in a place where a greater number of witnesses is necessary to a testament, and the testator had persevered in the said will to his death, although he had not survived ten years after the making of it, the proof which would result from an act of this nature, joined with the favor of the heir at law, would it not be sufficient to annul the testament, in the same manner as, in all sorts of other acts, and even for a donation of one's whole estate to take effect in the lifetime of the donor, two witnesses are sufficient with a notary, or two notaries without any witness? This question might be ranked in the number of those which demand rules for deciding them. And without deciding it, it seems reasonable to believe, that, since Justinian required only three witnesses with the space of ten years, and judged in this case the revocation of the testament just and favorable, although without the formality required in a testament, an act made before two public notaries, or one notary and two witnesses, setting forth in an authentic manner the will of the testator to revoke his testament, might have this effect; espe-

cially since it would seem that fewer formalities are necessary to leave the inheritance in the natural order to the heir at law, than what the law requires to deprive him of it, and that it does not seem necessary that he who, after having made a testament, changes his mind and is willing to die intestate, should make a second testament in the same form and manner.

XIII.

3130. *The Testament may be either entirely annulled, or only as to the Institution, or as to some other Clause.* — Among the different causes which annul the wills of testators, and which have been explained in the foregoing articles, we must distinguish between those which destroy entirely the whole testament, so that there does not subsist so much as any one disposition in it, either for the institution of the heir or executor or for the legacies, and those which only annul either the institution of the heir or executor, or some other disposition, without touching the rest; which depends on the rules that follow.[q]

XIV.

3131. *The Second Testament annuls or changes the First, according to the Dispositions it contains.* — In the case of a second testament, the first is either entirely annulled in all its parts, or only in that which the second may have changed in it, as has been said in the second article. Thus, the effect of the will of the testator in his first testament depends on the effect which his will explained in the second testament ought to have.[r] And by the second testament we are always to understand that which is the last, how many soever the former testaments are.[s]

XV.

3132. *The Birth of a Child annuls the whole Testament that made no Mention of it.* — In the case of the birth of a child, which the testator did not foresee, and of which he had made no mention in the testament, it is entirely annulled, and nothing of it subsists, even although the testator had instituted by the said testament his other children which he had at that time.[t] For it may be said,

[q] See the following rules.

[r] This is a consequence of the first and second articles.

[s] *L.* 1, § 1, *D. de bon. poss. sec. tab.*

[t] Si pater duos filios hæredes instituerit, et agnatione posthumi ruptum testamentum

with respect to the dispositions of that testament, that, if the testator had foreseen the birth of this child, he would have burdened the succession with fewer legacies, or perhaps would have left none at all. And it might likewise happen, that, if this testament ought to subsist, this child would be reduced to its legitime, or child's part, contrary to the intention of the testator; so that we ought to presume of such a testament, that the dispositions thereof are contrary to those which the birth of this child would have obliged the testator to make if he had foreseen it.

XVI.

3133. *The Legacies of Undutiful Testaments subsist.* — If a testator having children, or, if he is without children, having parents, makes no mention of them in his testament, or if he disinherit them without just cause, the testament will be null only with respect to the institution of other heirs or executors in the place of his children or parents, and all the other dispositions of the said testament will have their effect.[u]

XVII.

3134. *The Next of Kin being instituted, cannot renounce the Execution of the Testament, that he may succeed to the Testator as dying Intestate.* — In the case where the heir at law or next of kin is instituted heir or executor by a testament, if, to avoid payment of the legacies, he should pretend to renounce the testamentary succession, and keep to his right of succeeding to the deceased as dying

fuerit, quamvis hæreditas pro duabus partibus ad eos pertineat, tamen fideicommissæ libertates præstari non debent, sicut nec legata quidem aut fideicommissa præstare coguntur. *L.* 47, *D. de fideicom. libert.*; — *l.* 24, § 11, *eod.* See the sixth article. We may gather this consequence from this text, that even the most favorable legacies would be revoked in this case, since it annuls the legacies of liberty given to slaves. But if there were in the said testament a legacy left to servants, in lieu of wages due to them, it would not be so much a legacy as an acknowledgment of a debt which ought to be acquitted; and it would be the same thing, if the testator had charged his heirs or executors with some restitution which he was obliged to make. For the cause which would annul this testament would not annul the proof that it would make of a truth of this nature.

[u] *Nov.* 115, *c.* 3. This text relates to the testaments of fathers and mothers, and other ascendants; and the same thing is ordained at the end of the fourth chapter of the same novel, with respect to the testaments of children who forget or disinherit their fathers, mothers, or other ascendants.

By the ancient law, the legacies and other bequests of undutiful testaments were annulled, as well as the institution of the heir or executor. See the remark on the fifth article of the fourth section of *Undutiful Testaments.*

intestate, he would nevertheless be bound to acquit the legacies and the other charges regulated by the testament.[x]

XVIII.

3135. *If he that is instituted Heir or Executor in the Testament renounces by Collusion with the Next of Kin, the Testament shall subsist with Respect to all the other Dispositions.* — If he that is instituted heir or executor in a testament renounces the succession on purpose that it may go to the heir at law or next of kin, the heir at law will be obliged to pay the legacies and the other charges of the testament, although he had given nothing to the person named heir or executor in the testament to induce him to leave the inheritance to him, and the said executor had done it out of mere favor and courtesy to the heir at law.[y]

XIX.

3136. *If he renounces without this Collusion, what will be the Effect of this Renunciation.* — If in the same case, where another person is instituted heir or executor in the testament than the heir at law, he should renounce the inheritance, not out of any consideration for the interest of the heir at law, but because he did not find his account in accepting the inheritance, this institution would be of no effect, as has been said in the tenth article. Thus, the inheritance passing to the heir of blood, the testament would remain without effect in its most essential part, which is the institution of an heir or executor.[z]

Remarks on the Preceding Article.

3137. We have mentioned in this article only the bare nullity of the institution of the testamentary heir or executor, and not the

[x] *L.* 1, *D. si quis omiss. causa testam.*; — *d. l.* § 9, *in f.* See the following article, and the fourth article of the first section.

[y] *L.* 1, § *ult. D. si quis omiss. caus. testam.*; — *l.* 4, *eod.* See the eighteenth article of the first section of *Heirs and Executors* in general.

We have not put down in this article, that it is necessary that the design of defeating the legatees should appear clearly, as is said in the first part of this last text. For besides that in the sequel thereof it is said that this rule shall take place chiefly, if there were any designs to destroy the dispositions of the testament; which seems to intimate that, even without this design, the heir at law would be bound for the legacies; another consideration arising from what shall be remarked on the following article has induced us not to add this restriction to the rule explained in this article.

[z] *L.* 1, *in f. D. de injust. rup. irr. fact. test.*; — *l.* 9, *D. de testam. tut.*; — *l.* 20, *D. de bon. poss. contr. tab.*; — *l.* 2, *in f. C. si omiss. sit. caus. test.*

absolute nullity of the whole testament, and of all the other dispositions that it might contain, although it was the rule of the Roman law, explained in the texts cited upon this article, that all the dispositions should remain null, if he that was instituted executor or testamentary heir did not accept of the succession. This rule was founded upon this, that the institution of the heir or executor was considered as the most essential part of the testament, and the foundation of all the other dispositions. Which went so far in the ancient Roman law, that it was necessary to begin the testament by the institution of the heir or executor, and that all the legacies which preceded the said institution were null, even those which gave liberty to slaves,[a] although there were no other nullity in the testament. It was upon the same principle that they made likewise the validity of the legacies to depend on the executor's acceptance of the inheritance. So that it depended altogether on the executor to make the legacies valid by his accepting the inheritance, or to annul them by renouncing it.

3138. It appears clearly from these principles of the Roman law, that this rule, which annuls the legacies for want of a testamentary heir or executor, cannot have place in the customs of France, seeing they do not acknowledge any testamentary heir, and that testaments in the said customs are, according to the spirit of the Roman law, nothing else but codicils. And as for the provinces which are governed by the written law, the case is so rare, since the invention of the benefit of an inventory, for legacies to be lost by the testamentary heir's renouncing the inheritance, that it has never perhaps once happened. For what person is there who is instituted by a testament, who having hopes to reap some advantage from the succession, and being at liberty to accept it with the benefit of an inventory, will readily renounce it? And if he refuses it only because it is really burdensome, the legatees lose nothing thereby, seeing legacies are paid only after the debts.

3139. It is true, that in the ancient Roman law it might very well happen that a testamentary heir might renounce an inheritance which would have proved advantageous. For before the invention of the benefit of an inventory, as there was no medium between accepting purely and simply the inheritance, and renouncing it, it might easily fall out that a testamentary heir might renounce a succession, which the apparent charges might render

[a] *V.* § 34, *Inst. de legat.*

suspicious, although the goods of the succession might be more than the charges; and it was in that time that this law was established. But after the invention of the benefit of an inventory, it cannot well be supposed that this case should happen, that a succession, in which there may remain goods to the heir or executor, should be abandoned. And in fine, although it should happen that a testamentary heir should renounce a succession, of which the goods are sufficient to clear all the charges, and to pay off either the whole legacies or a part of them, it does not seem to be just, nor agreeable to our usage, that the legatees should lose their legacies because the heir or executor would not accept of the inheritance. For as this rule of the Roman law, which annuls the legacies when he that is instituted heir or executor abandons the succession, has had for its foundation only these niceties which we have just now explained; so, likewise, it may be considered as a pure nicety, and may be said to be contrary to the first and most essential principle of the Roman law itself in the matter of testaments, which is, that the will of the testator ought to serve as a law, as has been remarked in its proper place;[b] since this will is not limited to the institution of an heir or executor, but respects likewise the legacies, and sometimes legacies that are more favorable than the institution itself, and which the testator will have acquitted independently of the will of his heir or executor, and even against his will if he should oppose it.

3140. It may be said further, that it is contrary to equity to make bequests, that are just and reasonable, to depend on the whimsical humor of an heir or executor; and to make legatees lose the recompenses of their services and other good deeds, on which may depend the subsistence of their families; and that for no other reason but that of a bare nicety, which can be of no advantage to any person besides the heir at law, who could not expect the succession but with the condition of acquitting the legacies, if he had been called to it by the testament, and who, not being called to succeed by the testament, ought to content himself with taking the place of him that is instituted by the testament, with the charges which the testator had imposed upon him. So that we might in this case, more than in any other, put in practice the sentiment of the most learned commentators, who will

[b] See the seventh article of the first section of this title, and the fifth article of the following section.

have the codicillary clause to be supplied in every testament, as has been said in the fourth section; which would have this effect, that this heir at law would be obliged to acquit the legacies in default of him that is instituted heir or executor by the testament; and that although he were heir by another title than the testament, yet he ought not to have the benefit of the succession without acquitting the charges of it, according to these words of one of the laws concerning this matter, *Quocunque enim modo hæreditatem lucrifacturus quis sit, legata præstabit. L.* 1, § 9, *in f. D. si quis om. caus. test.* For although these words do not precisely relate to the case in question, yet the sense and meaning of them is applicable to it.

3141. Although all these considerations seem sufficient to make the legacies subsist, when the testamentary heir renounces the succession, yet the validity of the legacies in this case may likewise be founded on another principle of equity, and which is also of the Roman law, that in the cases where the question is concerning the validity of an act, in which are contained two things that have some connection with one another, if one of the two cannot subsist, yet the act is nevertheless valid for that which may subsist without the other. Thus, for example, when by one and the same act two persons have bound themselves as sureties for another, if one of the said persons could not bind himself, as if it was either a minor or a woman, who by the Roman law could not oblige herself for other persons, the act which would be null with respect to the said woman or minor would subsist for the other, who would remain obliged solely for the whole debt.[c] It is only the acts of which no one part can subsist but by the validity of the whole together, that are annulled in the whole by the nullity of any part; as if, two arbitrators being named by a compromise, one of them either could not or would not accept thereof, the nomination would be altogether fruitless with respect to them both; for one of them cannot judge without the other;[d] so that the nomination of one alone would subsist to no purpose. But even in the cases which relate to only one thing, which can admit of no division, the laws suppose a division therein, in order to make the acts subsist so far as is possible. For it is the spirit and intention of the laws to give to all sorts of acts all the effect that they can reasonably have. Thus we see, even in the Roman law,

[c] *L.* 48, *D. de fidei; —l.* 8, *C. ad senat. Vel.*

[d] *L.* 7, § 1, *D. de recept.*

that Justinian having dispensed with the registering of donations that should be under a sum which he had regulated, he ordained that the donations exceeding the said sum, which were not registered, and which for want of being registered ought to be null, should subsist for the sum that might be given without being registered. So that that donation was partly null, and partly had its effect.[e] Thus, by our usage, a donation of all one's goods, present and to come, may be divided by the donee, who may restrain it to the goods which the donor had at the time of the donation, as has been remarked on the sixth article of the thirteenth section of *Heirs and Executors* in general.

3142. It is from these principles that the rule of the canon law has been taken, which says, that that which may be valid ought not to be annulled because of its connection with that which is invalid: *Utile non debet per inutile vitiari. C. 37 de reg. jur. in 6.* Which is to be understood of the cases where this connection is not such that one of the two things cannot subsist without the other. Thus we may say, that, according to the same principles, it is equitable that a testament which is without effect as to the institution of an heir or executor should, nevertheless, subsist as to the other dispositions, since they have no necessary connection with the said institution, each of them having its cause in the intention of the testator, which makes them independent one of another. For as his will is in general, with respect to them all together, that they should have their effect, so his will is in particular, with respect to every one of them, that it should be executed, even although the others could not have their effect.

3143. Upon the same subject we may remark a decision of the Emperor Antoninus, in a cause which was argued before him; the question was, to know whether, a testator having blotted out in his testament the names of his executors, the legacies with which his executors were charged in the said testament ought to subsist. The emperor's advocate, who was of counsel against the legatees, pretended that the said legacies were escheated, that is, of no effect for the legatees, and that they did belong to the exchequer, according to the law which was then in being;[f] and he quoted the rule, that, for want of a testamentary heir, all the dispo-

[e] *L. 34, C. de donat.; — l. 36, in f. eod.; — Nov. 162, c. 1, § 2.* According to our usage in France, every donation that is not enrolled is entirely null. See the fifteenth article of the third section of *Donations.*

[f] *V. l. un. § 1, et seq. C. de caduc. toll.*

sitions of the testament were null, *Non potest ullum testamentum valere quod hæredem non habet.* But the emperor, who, knowing this rule, had said before of himself that these legacies could not be valid, having ordered the partie and their advocates to withdraw, that he might reflect at more leisure upon the matter, made them be called in again, and told them that it was just that the said legacies should be confirmed.[g] But if it is equitable to make the legacies subsist in a case where the testator seemed to annul his testament by blotting out the names of his executors, there is much more reason to confirm the legacies of a testament, in which the testator has made no manner of change or alteration, and where nothing has happened but the unjust caprice of the testamentary heir, who, notwithstanding he may, without any injury to himself, enter heir with the benefit of an inventory, takes a course which can be of no use but to destroy the legacies, without reaping any advantage thereby himself. It is true, that in the case of this law it was the cause of the exchequer against the legatees, and that this emperor preferred the interest of the legatees to that of the exchequer; but he might have given up the right of the exchequer, without making the legacies to subsist, and might have left to the heir at law the whole inheritance. Thus, the principle of equity, which was the foundation of the emperor's decision, might likewise very justly decide in favor of the legatees, in the case where their right is called in question only by the deed of the executor, and not by any change of will in the testator; for in this case the condition of the legatees is more favorable than in that where the testator, by blotting out the names of his executors, did himself give a mortal wound to his testament.

3144. It is upon account of all these considerations, that we have been induced to be of opinion, that this rule of the Roman law, which annulled the legacies when the testamentary heir did not enter to the inheritance, is not conformable to our practice; which might likewise be founded on a rule of the Roman law, which says that the legacies belong to the legatees from the moment of the testator's death, without waiting till the testamentary heir accepts the inheritance; and that, if he happens to die before he takes upon him the execution of the will, they transmit their right to their legacies to their heirs.[h] It would seem to

[g] *L.* 3, *D. de his quæ in test. del. ind. vel inscrib.*

[h] See the first article of the ninth section of *Legacies.*

be a consequence natural enough from this principle, that, since the legatee has acquired his right before the testamentary heir accepts of the succession, he should not lose it by his non-acceptance of it; and especially in our usage, which prefers always natural equity to niceties. To which may be applied the words of the same law, which contains this decision of the Emperor Antoninus which we have just now explained: *In re dubia benigniorem interpretationem sequi non minus justius est, quam tutius;* that is to say, that in doubtful cases the safest and best way is to follow that which is most equitable.

3145. We must in the last place observe concerning the validity of the legacies in the cases where the testamentary heir renounces the inheritance, that by the first novel of Justinian, chap. 1, if any one of the heirs or executors, being charged with legacies, did delay to acquit them for a whole year, he was deprived of his right to the inheritance, which went to the heir or executor substituted in his place, if there was any; and in default of him to his coexecutor, and in default of executors, or testamentary heirs, to the heirs at law; but still with the charge of acquitting the legacies. And if there was neither substitute nor coexecutor, or they would not accept the inheritance, and the person whose right it was to succeed in case there had been no testament had likewise refused, then the goods went to the legatees. It would seem to be very conformable to the same spirit which moved the lawgivers to take such a multitude of precautions for having the legacies acquitted, that they should not be annulled in the case where the testamentary heir renounces the inheritance, no more than in the case of this novel, where the heirs who are called in default of the executor that delays to acquit the legacies do renounce likewise, and where the law uses all possible means to prevent the legacies from perishing.

XX.

3146. *The Incapacity happened to the Testator annuls all the Dispositions of the Testament.* — When the testament is annulled by reason of a change in the state of the testator, which has put him under an incapacity of having heirs or executors, as has been said in the eleventh article, this testament will not only be null as to the institution of the heir or executor, the testator not being capable of having any, but likewise as to all the other dispositions

of the testament, even the most favorable; for his incapacity renders them all null.[a]

XXI.

3147. *The Testator may annul his Testament by tearing or razing it.* — If the testator tears the original of his testament, or if he razes or crosses the subscriptions, or by any other means puts his testament into such a condition, by rasures or dashes, that it appears that his intention was to annul it; it will remain null, although there has been no other testament made.[b]

XXII.

3148. *The Blots and Dashes made by Chance, or against the Will of the Testator, do not annul the Testament.* — If the testament had been torn or blotted out by some chance, or some imprudence, or out of malice, contrary to the intention of the testator, and the truth of the said fact appeared to be well proved; it would nevertheless have its effect, if what remained entire of the testament should sufficiently explain the dispositions of the testator.[c] But if there was any clause defaced in such a manner that it is not possible to read so much of it as would be necessary to make it to be understood, the impossibility of knowing justly what the testator had written or caused to be written therein would hinder the execution of it.[d]

XXIII.

3149. *The Additions made to explain the Testament do not annul it.* — If after the testament is entirely written and signed, and the witnesses are withdrawn, the testator had a mind to make some change in it, he could not do it but by a new disposition made according to form: but if, without an intention to alter any

[a] *L.* 6, § 5, *D. de inj. rupt. irr. fact. test.* See the eleventh article.

[b] *L.* 22, § 3, *D. qui testam. fac. poss.*; — *l.* 30, *C. de testam.*

[c] *L.* 30, *C. de testam.*; — *l.* 1, *D. de his qui in testam. del.*; — *d. l.* § 1.

[d] *D. l.* 1, § 2; — *d. l.* 1, § 3. If the notaries or witnesses knew the contents of the place that is defaced contrary to the intention of the testator, and the circumstances should render favorable the proof that their declaration might make, it seems reasonable that in this case their testimony should be received; which would be conformable to this last text, where it is said that that which is defaced without any design of the testator, and which cannot be read, ought to be executed. For it cannot be executed unless it be known; and unless it can be read, it cannot be known but by the declaration of the notary and witnesses who may know it. And this proof would have nothing in it contrary to the ordinances and our usage.

thing material in the will, he had a mind only to add some words to explain a dark and equivocal expression; as if, having bequeathed a set of horses, having more than one set; or a suit of hangings, without naming which suit, he having many; or having left a legacy to a person whom he had not described clearly enough; he should explain, either in the margin, or at the bottom of the testament, what set of horses or what suit of hangings he meant to give, or should mark more precisely the qualities that may distinguish this legatee, additions of this kind, or others of the like nature, would not annul the testament: for they would make no alteration in the will of the testator, and would not contain any new bequest; but would only explain some obscurity in those which he had already made, and which without this explication would have raised after his death difficulties how to judge, by interpretations and reflections on the circumstances, what had been his intention.[e]

XXIV.

3150. *We ought to judge of Rasures and Additions according to the Circumstances.* — In the questions which concern the regard we ought to have to rasures, dashes, additions, or other changes which may happen in a testament, and wherein we are to judge of the effect they ought to have, we must distinguish between what was done at the time of making the testament, and was approved of in presence of the notary and witnesses, and what was done afterwards, after that the testament was perfected. In the first case, whatever is approved of in the presence of the notary and witnesses makes a part of the testament. And, in the second case, we ought to distinguish what has been done after making the testament, by the testator himself, whether it were to explain any thing in the testament, as in the cases of the foregoing article, or through inadvertency, or with a design to annul the testament by rasures that might have this effect, or with other views, from that which is done by other persons, either without any design, or out of malice, or to forge something into the will. And it is by these several views, and the foregoing rules, that we are to judge, according to the circumstances, what ought to be the effect of these changes.[f]

[e] *L.* 21, § 1, *D. qui testam. fac. poss.*
[f] *L.* 12, *C. de testam.*

XXV.

3151. *A Testament made by Force is Null.* — Seeing the testament ought to contain only the will of the testator, which ought to be free; if it were proved that a testator had been obliged by some violence, or other unlawful way, to make a testament, or other dispositions in view of death, not only would they be null, but the author of this attempt would be punished for it, as for a crime, according to the quality and circumstances of the fact.[s]

Remarks on the Preceding Article.

3152. We must not confound with the unlawful ways spoken of in this article certain ways which a great many persons make use of to engage the testator to make his will in their favor, such as services, good offices, caresses, flatteries, presents, the interpositions of persons who cultivate for them the good will of the testator, and engage him to make some bequest in their favor: for although these kinds of ways may be inconsistent either with decency or good conscience, or even contrary to both, yet the laws of men have not inflicted any penalties on those who practise them. And when these sorts of impressions have had the success to engage the testator to make voluntarily the dispositions he was entreated to do, yet they become his will; and the motive of the ways which have engaged him thereto does not render them null; since it suffices that he has made them voluntarily and freely. Thus, this commonplace of all those who, complaining of the dispositions of a testament, say that it was put upon the testator against his will, is only an uncertain and fruitless argument, unless it be founded upon circumstances of some unlawful way; and if the testament has not been really and truly suggested, in such a manner that the testator himself had not explained his own intentions; but that, for example, persons taking advantage of the weakness of a sick man at his last gasp, had contrived a testament which they presented to him, and, after having read it over to him, asked him whether he was not willing to approve all the clauses of it, and he had answered, Yes; this would be a suggestion really and truly unlawful, and which, being proved, would annul dispositions made after this manner.*

[s] *L.* 1, *C. si quis aliq. test. prohib. vel coeg.* See the tenth article of the third section of *Heirs and Executors* in general.

* See the twenty-seventh article of this section, and the eighth article of the eleventh section of *Testaments*.

XXVI.

3153. *The Testament is Null with Respect to him who forcibly hinders the Revoking of it.* — We ought to reckon among the number of dispositions that ought to be annulled, that which a testator, being desirous to revoke, had been hindered from doing it by violence, or some other unlawful way, on the part of those who were to reap advantage from the said dispositions: for with respect to them, they, by rendering themselves unworthy of the said dispositions, would render them null, according to the rule that has been explained in its place.[h]

XXVII.

3154. *The Dispositions procured by some Good Office or Service are not Null.* — We must not count among the unlawful ways which may annul a testament, the civilities, the good offices, the services, which one relation may render to another, a friend to his friend, a wife to her husband, or a husband to his wife, in order to deserve, by that means, some kindness, or to prevent the making of dispositions to their prejudice, which might be the effect of some bad impression made upon the testator by false reports, or other causes, and which they might be desirous to remove, and to induce the testator to have more favorable thoughts of them by these kinds of good offices.[i]

SECTION VI.

OF THE RULES OF INTERPRETING OBSCURITIES, AMBIGUITIES, AND OTHER DEFECTS OF EXPRESSION IN TESTAMENTS.

3155. HAVING explained the nature and forms of testaments, and the several causes which may annul them, it is proper, in the next place, to explain the rules that are necessary to give to testaments that do subsist their just effect, by the interpretation of the clauses which may give occasion to any difficulty or doubt, either as to what may concern the institution of the heir or executor, or the other dispositions.

3156. The difficulties which may demand some interpretation

[h] See the tenth article of the third section of *Testaments*.

[i] *L. ult. D. si quis alig. test. prohib. vel coeg.*; —*l. ult. C. eod.* See the remark on the twenty-fifth article.

in testaments are of two sorts. One is of those which arise from some obscurity, from some ambiguity, or some other defect of expression; and the other is of those which may proceed from something else than a defect of expression, and which render it necessary to find out the intention of the testator by some other ways than by the knowledge of the sense of the words. The difficulties of the first kind shall be the subject-matter of this section; and those of the second shall be explained in the following section.

3157. We may apply to these two sorts of difficulties some of the rules which relate to the interpretation of covenants, and likewise some of those which concern the interpretation of laws. And it will be easy to discover which of those rules may be applied here by the bare reading of the second section of *Covenants*, and of the second section of the *Rules of Law*. All the rules explained in this and the following section are to be understood, not only of testaments, but of all dispositions made in prospect of death, although there is mention made only of testaments.

ART. I.

3158. *Three Sorts of Expressions.* — There are three sorts of expressions to be distinguished in testaments. The first is of those that are perfectly clear; the second, of those that are so obscure that it is impossible to give them any meaning; and the third is of those in which there is some obscurity, some ambiguity, or some other defect, that may render the sense of them uncertain. And each of these kinds of expressions hath its proper rules, which shall be explained in this section.[a]

II.

3159. — *First Sort of Expressions, those that are Clear.* — The expressions which are perfectly clear do not admit of any interpretation to make their sense known, since their clearness makes it evident enough. And if the disposition of the testator appears to be clearly and distinctly explained thereby, we ought to keep to the sense that appears by the expression.[b]

III.

3160. *Second Sort of Expressions, those that have no Meaning*

[a] See the following articles.

[b] *L.* 25, § 1, *D. de leg.* 3; — *l.* 3, *in f. C. de lib. præter. vel exhæred.* See the fifteenth article, and the last article.

at all. — The expressions which cannot have any meaning are rejected as if they had not been written, and do not hinder the others from having their effect.[c]

IV.

3161. *Third Sort of Expressions, those which are Obscure.* — The expressions in which there is some obscurity, some ambiguity, some double meaning, or other defect, which may render their sense uncertain, ought to be interpreted by the rules which follow.[d]

V.

3162. *The First Rule of the Interpretation of Testaments, the Will of the Testator.* — Since the law permits testators to dispose of their goods by a testament, it follows that the will of the testator holds therein the place of a law.[e] Thus, the first rule of all interpretation of testaments is, that the difficulties in them ought to be explained by the said will of the testator, as far as it can be known from the whole tenor of the testament, and the other proofs that may be had of it, and that it is just and reasonable, and has nothing contrary to law or good manners.[f] And it is to this first rule that all the others which concern the interpretation of testaments are reduced;[g] as will appear throughout the rest of this section, and in the following.

VI.

3163. *The Uncertainty of the Expression is explained by the Intention of the Testator.* — If there is in a testament any ambiguity, or other defect of expression, which may have a meaning different from the will of the testator, which is otherwise well known, we ought to prefer the intention of the testator to that other meaning.

[c] *L.* 2, *D. de his quæ pro non script.*

[d] See the articles which follow.

[e] See the first and seventh articles of the first section.

[f] *L.* 1, *D. qui test. fac. poss.*; — *l.* 15, *D. de condit. instit.*

[g] *L.* 5, *D. de necess. serv. hæred. instit.* There is this difference between covenants and testaments, as to the manner of interpreting them; that in covenants we must consider differently either the common will of those who treat together, or the bare will of one of the two, without regard to the will of the other, according to the principles which have been explained in the second section of covenants. But in testaments, where the testator alone explains his will, that will alone is always the only rule. See the texts cited on the seventh article of the first section.

Thus, for example, if he who had a mind to institute an heir or executor contents himself with naming him by his surname, without adding either his quality, or other circumstances which may distinguish him from other persons that have the same name, it is by the ties of friendship or relation that the testator may have had with one of the two or more of the same name, that we are to judge which of them he intended to name for his heir or executor. Thus, for another example, if the testator had erred in the name of his executor, calling him James instead of John, and there were another person of the same name and surname which the testator had made use of, but to whom the qualities which he had considered in the choice of his executor could not agree; the same circumstances of friendship, kindred, or others, which might serve to distinguish the person whom the testator had in his mind for his executor, would make him to be preferred to the person who was named only by mistake, contrary to the intention of the said testator. And it would be the same thing in a mistake of the like nature concerning any of the legatees.[h]

VII.

3164. *A False Description does no Prejudice to a Bequest that is otherwise sufficiently Clear.* — If the testator, having sufficiently explained himself, either as to the person of his executor or of a legatee, or as to the thing bequeathed, had added, the better to specify either the person or the things, some quality or other mark which should appear to be false; as if, having named the executor or legatee, he had added these words, *who is son of such a one, or of such a country;* or that, having devised some land or tenement, described by its name or by its situation, or otherwise, he had added, *that he had bought the said land or tenement of such a person;* all these additions, although they should be found to be false, would make no alteration in the dispositions, which otherwise are clear enough. For if the persons or things are sufficiently described by the first expression, what is added to describe them more plainly, being superfluous, will only be a mistake which can do no prejudice.[i]

[h] § 29, *Instit. de legat.*; — *l.* 4, *C. de testam.*; — *l.* 17, § 1, *D. de condit. et demonstr.* See the twenty-sixth article of the second section.

[i] *L.* 75, § 1, *D. de leg.* 1; — *l.* 76, § 3, *D. de leg.* 2; — *l.* 48, § *ult. D. de hæred. instit.*; — § 30, *Inst. de legat.*; — *l.* 17, *D. de condit. et demonstr.*; — *l.* 10, *D. de aur. arg.* See the fifth article, and the eleventh article of the eighth section.

VIII.

3165. *The Obscurities and Ambiguities are explained by the Circumstances.* — If there are in a testament any expressions which are not determined to a certain meaning by the natural signification of the words, and that there is in them some obscurity, some ambiguity, or other defect, which makes it uncertain what it was the testator had a mind to express; these sorts of expressions will be interpreted by the proofs that may be gathered of his will from the different circumstances that may serve to that end, and from discerning the effect of these circumstances by the use of the rules that follow.[1]

IX.

3166. *Interpretation of a Legacy that has Relation to two Things, and must be fixed to one.* — If the testator express himself in a legacy in such a manner that his expression seems to have relation to two things, one of which alone he has in view, and he has not sufficiently determined which of the two he has a mind to bequeath, we shall judge of his intention by the circumstances which may give any light thereto. Thus, for example, if a testator, who had two pictures, one of a St. John by Raphael, the other of a battle by Rubens, having only these two pieces of the said two painters, had bequeathed his battle of Raphael, the expression of the name of the painter would mark the St. John, and that of the history of the picture would point out the battle. Thus, this expression would have some relation to both the pictures; and it would seem that the legatee might demand a picture of Raphael's. But because the history of the picture of the battle would denote it more sensibly than the name of Raphael would do that of the St. John, and these pictures would be more distinguished by their subjects, which are so different, than by the different names and merits of the painters, the legatee would have the battle, although it were of another hand than of Raphael.[m]

Remarks on the Preceding Article.

3167. If we suppose, for another example, that a testator, who had a black Spanish horse and a white Barbary horse, had bequeathed his white Spanish horse, would the legatee have the

[1] *L.* 24, *D. de reb. dub.*; — *l.* 3, *D. eod.* See the following articles.
[m] *L. penult. D. de reb. dub.*

Spanish horse or the barb? The kind would denote the Spanish horse, and the color the barb; which might be a foundation for two opposite interpretations. For if the testator was ignorant of the difference between a barb and a Spanish horse, it might be presumed that it was the barb which he had bequeathed, having distinguished him by the color, which he could not but know. But if we suppose that the testator knew perfectly well the difference between a Spanish horse and a barb, will not his making mention of the Spanish horse induce us to think that he did not err in the kind, and that he had really a mind to give a Spanish horse; and that thus the error being only in the color, and not in the kind, it would be a mistake either of the person who wrote the testament, or of the testator himself, who, by having added the color, had rendered his expression uncertain? Or will it be said, that, the color making a greater distinction than the kind, the testator hath bequeathed the barb? Or, lastly, will one choose rather to decide the doubt in favor of the executor, and give him his choice, by the rule explained in the sixth and following articles of the seventh section; or in favor of the legatee, and give him the choice, pursuant to the rule explained in the tenth and following articles of the same section? Which would depend on the circumstances which might make the presumption to be in favor of the legatee; for if the circumstances did not decide it for him, and if the question were in an equal balance, and really doubtful, it would be the heir or executor that ought to have the choice.

X.

3168. *A Mistake in the Name of the Thing bequeathed does no Harm to the Legacy.* — If he who has a mind to devise some land or tenement errs in the name, whether it be through forgetfulness, or because he had a design to change the name thereof, or through some mistake, and gives to the said land or tenement the name of some other, but so as that this mistake appears otherwise by the circumstances, and that his will be sufficiently known, the legacy shall have its effect for the land or tenement which he had a mind to give, although he has mistaken its true name.[n]

XI.

3169. *The Words which are necessary to make the Sense perfect, may be supplied.* — If it happens that through some forgetfulness or

[n] *L.* 4, *D. de legat.* 1.

mistake, whether it be of the testator himself, if he writes his own testament, or of the person whom he employs to write it, there are wanting in some expressions necessary words, so that it cannot have any meaning without adding them, and that by such addition the sense is perfect, this omission will be supplied by supposing the words that are wanting to be there inserted. Thus, for instance, if a testator had said, *I institute such a one*, without adding the word *heir* or *executor*, it would be supplied. Thus, in a legacy, where it should be said only, *to such a one the sum of so much*, it would be reasonable to suppose the words, *I give and bequeath.* Thus, in all sorts of imperfect expressions, where one may judge by the expression itself, or by the sequel of the testament, what are the words omitted, which would naturally make up the sense which the testator had in his mind, it would be just to supply them.[o]

XII.

3170. *Example of a Conjecture for discovering the Uncertain Intention of the Testator.* — If the expression is defective, not because of the omission of a word that is necessary to be supplied for making the sense perfect, as in the case of the foregoing article, but because of some uncertainty, or obscurity, that could not be cleared up by any other expression in the testament; and the explanation thereof should depend on the knowledge of the intention of the testator, which he had not sufficiently made known; it would be necessary in this case to have recourse to the other proofs or presumptions which might discover the said intention. Thus, for example, if a testator had left to one person a yearly pension, without explaining the sum; as it would be certain, on one side, that this legacy ought to subsist, and uncertain, on the other, to what sum the testator had a mind to fix it, it would be necessary to regulate this pension in the manner that it might be reasonable to suppose the testator would regulate it himself, if he were alive. Which would depend on the circumstances of the quality of the testator, and largeness of his estate; on the quality of the legatee, and greatness of his wants; on the quality of the heirs or executors, whether they were descendants or ascendants to the testator, or collateral relations, or nothing of kin to him; and if they were children, in what number they were. But if this tes-

[o] *L.* 67, § 9, *D. de legat.* 2; — *l.* 10, *C. de fideicom.*; — *l.* 1, § *penult. D. de hæred. instit.*; — *l.* 7, *C. de test.* See the following articles.

tator was wont to give every year to the said legatee something for his maintenance, or alimony, the legacy might be regulated on the same foot with what the testator was wont to give him in his lifetime.[p]

XIII.

3171. *Another Example of the Interpretation of a Defective Expression.* — We may add, for another example of a defective expression, which it would be necessary to interpret by the intention of the testator, a legacy left in these terms: *I give and bequeath unto such a one the sum of so much until she is married,* without mentioning that this sum should be paid her every year to the time of her marriage; which would give rise to the question, whether it would not be only a legacy of this sum to be paid once for all, or whether it would be an annual legacy to the time of the marriage. And it is this last sense that these words ought to have, *until she is married;* for they ought to have their meaning and their effect, and they can have no other: so that these last words prove that the testator, who has made use of this expression, had a mind that this sum should be paid every year, until the marriage of this legatee,[q] unless there were particular circumstances in the case, and such as might require that another interpretation should be given to the words.

XIV.

3172. *The Legacy of a House takes in the Garden, which is a Part of it.* — If a testator who had a house buys a garden that is adjoining to it, and afterwards devises the said house, without making mention of the garden, it will be judged by the circumstances whether the garden ought to be comprehended under the legacy, or whether it ought not: for if the testator had bought this garden to join it to another house than that which he had devised by his will, or to build a separate house upon it, or for any other use than that of accommodating the house devised, it might not be comprehended in the legacy. But if the testator had bought this garden only for the conveniency of the said house, and to make it more healthy and more agreeable, and having made a passage from the house to the garden, he had looked upon it as

[p] *L.* 14, *D. de ann. leg.* See the twelfth article of the fifth section of *Legacies.*
[q] *L.* 17, *D. de ann. leg.*

one of its dependencies, the legatee would have the garden, together with the house.[r] For the testator would have made of these two distinct things only one messuage contained under the name of the house devised. And it is likewise the usual custom to understand by a house, not barely that which is designed for lodging, but likewise the courts, the stables, the garden, and the other dependencies and conveniencies that happen to be joined to it.[s]

XV.

3173. *That which is evident from the Terms is not interpreted.* — If a testator, being ignorant of the true use of the words, had left a legacy in terms which he believed did comprehend certain things that he had a mind to bequeath, but which the natural meaning of the said terms would not comprehend, and there was nothing in the sequel of his testament that discovered this intention, but the legatee pretended only to prove that the testator understood the said words in the sense that he had a mind to give to his legacy, such a proof would not be received for giving to the expression of a testament another meaning than that which the words bear, being taken in the sense they would have in the common acceptation of them. Thus, for instance, if a testator designing to give all his movables to a legatee, had made use of the word *utensils*, thinking that the said word comprehended them all, this legacy would be restrained to the movables that are commonly comprehended under this name. For although it is true that the intention ought to be preferred to the expression, yet that is only when the sequel of the testament discovers clearly the said intention; but not in cases where there is no doubt to be made of the meaning of the expression: for in that case the only presumption that can be admitted is, that the testator has said what he had a mind to say, and that he had no mind to say what he has not said.[t]

XVI.

3174. *The Word Children is understood only of those that are lawfully begotten.* — It follows from the rule explained in the

[r] *L.* 9, § 5, *D. de leg.* 3. See the fifth article, and the eighth article of the fourth section of *Legacies.*

[s] *L.* 7, § 2, *D. de suppellect. leg.* See the following article.

[t] *L.* 69, *D. de leg.* 3; — *l.* 4, *D. de leg.* 1; — *l.* 7, § 2, *D. de suppell. leg.*; — *d.* § *in f.* See the second article.

preceding article, that the expressions ought to be taken in the sense which common usage gives to the words.[u] Which is not to be always understood of the general and indefinite sense that all words may have; but of the sense which has relation to the subject-matter of the expression of the testator; and to the intention which he may have had. Thus, for example, the word *son* indefinitely and in general comprehends a bastard and a son lawfully begotten; but if a testator who had children lawfully begotten, having likewise a bastard, had made some dispositions in which he had named his children, or his sons without distinction, either instituting them his executors, or leaving them some legacy; or if a testator who had no children of his own had named for his executors the children of another person, or had given them any legacy, this naming of sons, or children, which may be applied to bastards, would not comprehend them.[x] For besides that we ought not to presume that this was the intention of the said testators, the names of sons and children are not applied to bastards in the indefinite expressions, but when they are certainly comprehended under the subject-matter of the expression. And this case being excepted, the indefinite signification of the words *sons* and *children* do not agree to them, except when the words are qualified with the addition of *bastards* to distinguish them.

XVII.

3175. *The Regard that ought to be had to the Destination of the Testator.* — If in the expression of things bequeathed either to the heirs or executors, or to the legatees, there were any uncertainty as to what ought to be comprehended under it, and what ought to be excepted from it, it would be necessary to regulate the extent, and to fix the bounds thereof, according as we might be able to judge what the testator himself comprehended under it, if his intention appeared either by some destination that he had made of the things bequeathed, or by some other way. Thus, for example, if a merchant who carried on different commerces in several provinces, and had divers warehouses for selling his goods, as at Rouen and Bourdeaux, and in other towns, had left in his testament to one of his heirs or executors, or to a legatee, all the stock of his trade at Rouen, and to another all the stock of his trade at Bour-

[u] *L.* 7, § 2, *D. de suppell. leg.*

[x] Filium eum definimus qui ex viro et uxore ejus nascitur. *L.* 6, *D. de statu hom.* Justi liberi. *L.* 5, *in f. D. de in jus voc.*

deaux, and there should happen to be at Bourdeaux at the time of his death merchandise which he had bought for Rouen, where he designed to sell it; the said goods would belong to him who was to have the stock of the trade at Rouen: for although the goods, being at Bourdeaux at the time of the testator's death, might seem to be part of the stock at Bourdeaux, yet the testator, by having destined them for the stock of his trade at Rouen, has made them part of that stock, and they would belong to him who ought to have that stock. Thus, in the same manner, if there were other goods bought at Rouen to be transported to Bourdeaux, they would belong to him who was to have that stock at Bourdeaux. And if, the goods not being as yet bought, the money designed for buying them were sent, and were still extant, either in specie or bills of exchange, this money, wherever it were, being part of the stock of the trade of that place where the goods were designed to be sold, would belong to the executor or legatee who ought to have the said goods.[y]

XVIII.

3176. *Other Examples of the same Rule.* — We may give, for another example of the rule explained in the foregoing article, the case where a testator having devised a country-house, with the movables, horses, and cattle which he used to keep there, it should happen that at the time of the testator's death there should be a set of horses which he commonly used in town, at the said country-house, whether it was because he died suddenly, or that they had been sent thither to be put out to grass for some time, or for some other reason; for by this rule these horses would not be comprehended in the said legacy, which ought to be understood only of the cattle and other things destined to be always in the said place. And for the same reason this legacy would include the plough-horses designed for the service of the said house, which should happen to be elsewhere at the time of the testator's death; for the different destinations of the testator would explain his intention, and show what should be reckoned to belong to the said house, and what not.[z] And the chance which in this case, as in that of the foregoing article, makes that a thing destined for one place happens to be in another, does not change its destination.

[y] *L.* 35; *d. l.* § 3, *in princip. et in f. et* § *penult. et ult. D. de hæred. inst.*; — *d. l.* 35, § 3, *D. de hæred. instit.* See the following article.

[z] *L.* 44, *D. de legat.* 3; — *l.* 67, *eod.*; — *l.* 86, *in f. D. de legat.* 3.

Thus, for another example of the same rule explained in the preceding article, if a testator, having bought by one and the same contract, and for one and the same price, two estates of different names, but which joined to one another, and having confounded the two together in his possession, by letting them both to farm by the same lease, under one of the two names only, or by inserting them in the same manner in his book or memorandum of his affairs, makes afterwards a devise in which he names only one estate by the same name under which he had confounded the two, declaring that he devises it such as he had purchased it, and without making any reserve or mention of the other estate; this devise under these circumstances will comprehend both the estates, which it would not do if there were only the bare circumstance of the purchasing both the one and the other by one and the same contract, and for one and the same price.[a]

XIX.

3177. *Divers Views for discovering the Intention of the Testator.* — It follows from the rules explained in the foregoing articles, that, in all the cases where the question is how to interpret the expressions of a testator, it is by the proofs or presumptions which may discover his intention that we are to judge of them; and this depends on the different circumstances that may have any relation to the difficulty that is to be adjusted. Thus, we consider the qualities of the persons, and those of the things, if those qualities can be of any use to discover the said intention. Thus, we distinguish the several usages of the places, either for the sense of the words, or for the other difficulties which the said usages may help to explain, and especially the particular usages of the testators in the economy and management of their affairs; and we take what we can have from their memorandums and journals of their affairs, and other such like circumstances.[b] But the regard that is usually had to all these views is of no use, unless it be directed by two other general views, which ought to be the first in all interpretations. One is, not to expose an expression that is clear in itself to

[a] *L.* 91, § 3, *D. de legat.* 3. We have put down in the article on the case of this last text, that the two estates were adjoining to one another; for if they were situated in different places, one single name could not agree both to the one and the other, and their separation would make two different estates, which could not be comprehended under one proper name.

[b] *L.* 50, § *ult. D. de legat.* 1; — *l.* 18, § 3, *in f. D. de instruc. vel instr. legat.*

interpretations contrary to the natural sense;[c] and the other is, not to prefer to reasonable presumptions of the intention of the testator a sense altogether opposite, under pretext of adhering slavishly to the literal sense of an expression, which the sequel of the testament, and the circumstances, would oblige us to understand otherwise, in order to reconcile it with the said intention.[d] Thus, in general it depends on the prudence of the judge, to examine whether an expression ought to be taken precisely in the literal sense, or if it is necessary, or equitable, to interpret it: and he ought to be careful in applying the proper rules by which it is to be interpreted.[e]

SECTION VII.

OF THE RULES FOR INTERPRETING THE OTHER SORTS OF DIFFICULTIES BESIDES THOSE OF THE EXPRESSIONS.

3178. Besides the difficulties that may arise from the defects of the expressions in testaments, there are others which have other causes, and which cannot be prevented by dispositions expressed in the clearest terms. Some of them proceed from the change that is made by unforeseen accidents, and which oblige us to conjecture, by presumptions which may be grounded on the known intentions of the testator, what he himself would have ordered, if he had foreseen these accidents. Others are occasioned by some error the testator was under in a matter of fact that was unknown to him, and where it appears clearly enough by his dispositions what he would have ordered if the truth which he was ignorant of had been known to him. And others have other causes altogether different. Although it is very difficult, and even impossible, for those who begin the study of the law to comprehend these several

[c] *L.* 25, § 1, *D. de legat.* 3. See the second and fifteenth articles.

[d] *L.* 69, § 1, *D. de legat.* 3.

[e] *L.* 7, *C. de fideicomm.* If, besides the ways explained in this article for discovering the intention of the testator, there should be found other testaments, although revoked, we might explain by the former testaments that which is obscure and uncertain in the testament which subsists, if the difficulty happens to be more clearly explained in any of the other testaments, provided that this is done without making valid any part of the said testament which has been revoked.

As to the use of the rule explained in this article, we must understand it in the sense which results from all the rules that have been explained in the foregoing articles of this section, for it has relation to them. See the last article of the following section.

kinds of difficulties without some examples, yet it is not proper to give any here, because each sort of difficulty is to be explained in its proper place in this section; and we shall there set down the examples that are necessary for understanding them aright. But we have been obliged to mark in general these kinds of difficulties, and to give here this idea of them, in order to show the difference which distinguishes them from the difficulties which have been the subject-matter of the foregoing section.

3179. It is necessary to remember here the last remark which has been made in the preamble of the foregoing section, concerning the rules of some other titles, which may have some relation to the interpretation of testaments. We shall not make here, nor in the sequel of this section, any division or distinction of the several sorts of cases in which the interpretations that shall be spoken of here are necessary, in order to reduce the said cases to certain kinds. For besides that the greatest part of them are such, that it is not possible to comprehend them under peculiar ideas that have precise characters to distinguish them from all the others, and that there are even some of them of which every one by itself would demand a proper kind; this exactness would not only be useless, but will produce, under the appearance of some order, a real confusion; and it is enough that all these cases are contained under the general idea that the title of this section gives of them; and that under this title the reader shall have the rules that are necessary for this matter, and the examples which show the application of them, and the use that may be made of them in all the cases that may arise from all sorts of events.

ART. I.

3180. *The First Rule of this Interpretation is the Will of the Testator.* — The first rule for the interpretation of the difficulties which are the subject-matter of this section, as well as of those which have been explained in the preceding section, is the will of the testator. And whether this will appears by the dispositions themselves, or by clear and certain consequences that may be drawn from them, or even by conjectures only, it is always by the knowledge that can be had thereof that we are to decide the matter, by adjusting the difficulty in the manner that we judge the testator himself would have done it, according to the views and sentiments which his dispositions show him to have had.[a]

[a] *L.* 5, *C. de necess. serv. hæred. instit.* See the fifth article of the preceding section.

II.

3181. *Interpretation by the Esteem which the Testator had for the Persons.* — If the difficulty which makes it necessary to interpret the testament depends barely on the consideration that the testator may have had for one of the persons interested in the said interpretation more than for the other, the question will be decided in favor of that person for whom the testator is judged to have had the greatest esteem: which will depend either on the particular proofs that may be had of it from his dispositions, or on the rules which follow.[b]

III.

3182. *Interpretation in Favor of the Heir of Blood against a Stranger.* — Between two heirs or executors whom a testator had called to his succession; the one, who was not of his family, by a former testament, made in due form; and the other, who had right to succeed to him if he died intestate, and whom he had instituted by a second testament, in which there was wanting some formality; the consideration of the heir of blood, or next of kin, would render his cause so favorable above the other, that, as it has been explained in another place, the law would give him in this case the succession,[c] contrary to the rule which prefers a former testament made in due form to a second in which some formality is wanting; which we repeat here only to show the spirit of the law, which in doubtful cases favors the heir of blood. From whence it follows, that in the cases where it is necessary to interpret some disposition of a testator, which concerns some person of his family, and another no ways related to it, if all other circumstances were equal, the tie of kindred would decide the matter, by the presumption that the testator had had a greater consideration for his relation than for a stranger.

IV.

3183. *Institution of a First Executor preferred to a Second Institution made in due Form.* — If he who had already made a testament, hearing afterwards, by a false report, that the executor whom he had instituted was dead in a foreign country, made a second testament, in which he had declared that, not being able to have for

[b] See the articles which follow.

[c] See the fifth article of the fifth section, where it is explained what are the formalities which are required in this second testament.

his executor the person whom he had named by his first testament, he named such a one; and if after the death of the said testator the executor instituted by the first testament should happen to appear, he would be preferred to him that had been instituted by the second, only because of this error. For the expression of the motive which had induced the testator to name another executor would be a sufficient reason to convince us that he would not have done it if he had known the truth. Thus, his expression showing his error would have the same effect as if he had instituted this second executor upon this condition, that he should be executor only in case the first were really dead, and that if the first executor were alive he should succeed, and exclude the other.[d]

V.

3184. *In the Case of the Preceding Article, the Legacies of the Second Testament would subsist.* — If in the case of the foregoing article the second testament contained legacies, the first executor would be bound to acquit them, in the same manner as if he had been named executor in this second testament.[e]

Remarks on the Preceding Article.

3185. If the case of the preceding article had happened, and there were likewise legacies in the first testament different from those of the second, this first executor, who, as it is said in the present article, would be obliged to acquit the legacies of this second testament, would not be bound to pay those of the first: for although his institution, which was the most essential part of the first testament, ought to subsist, and it was burdened with the legacies of the said first testament; yet they would be annulled by the rule which determines that the second testament annuls the first. And this executor might likewise say, that it is not by the validity of this first testament that his institution, which it con-

[d] *L. ult. D. de hæred. inst.* See, as to what is said in this text, that *Falsus modus non solet obesse*, that which is said in the twenty-first article.

If in this second testament the testator had not explained the motive that had induced him to name another executor, the bare error in which he was as to the death of this first executor would not have been a sufficient reason for annulling the institution of the second. For although he had had no thought of the death of the first, he might have had other motives for this change, whether it had been that he had ceased to have the same consideration for him that he had before, or that the second executor had by his civilities engaged the testator to make this second disposition, or for other causes. See the following article.

[e] *L. ult. in f. D. de hæred. inst.*

tains, ought to subsist, but by the effect of the intention of the testator explained in the second; which marked expressly that he named another executor besides him, for no other reason but because, believing him to be dead, he supposed that he could not succeed to him; which implied the tacit condition, explained in the preceding article, and the will of the testator, that, if the first executor were alive, he should succeed to him: but that this tacit condition, and this will of the testator, which had the effect to annul the institution of the executor in the second testament, and to confirm that of the first, did noways concern the legacies of this first testament which the second did not confirm; and that therefore the revocation of those legacies in the first testament which had been made by the second ought to subsist, although the revocation of the institution of the executor of the first testament did not subsist.

3186. We see by this event a pretty odd effect which deserves our consideration. It is, that the condition of this second executor, for whom the testator had a much greater consideration than for the legatees of the same testament by which he was instituted, is much more disadvantageous than that of the said legatees; since they are to have all that the testator had a mind to give them, and that he who was to have had the whole bulk of the estate will have nothing at all: so that the intention of this testator happens to be frustrated, in that the condition of the legatees will be better than that of this executor.

3187. We may make here a last reflection on this difference between the condition of this executor and that of these legatees, that it is impossible for human laws to be so exact as to regulate all the cases that may possibly happen in such a manner as that, by observing always these laws, whether according to the letter or according to the spirit of them, there shall arise no inconvenience from them; and that such provision shall be always made for all sorts of events, that nothing in any one of them shall be contrary to that which equity may demand; but we see frequently those sorts of inconveniences which connot be redressed. And there would be no other remedy for this inconvenience besides the civility of the first executor, who, considering the condition of him in whose place he succeeds, and the good will that his benefactor had towards the said person, should be disposed, upon this consideration, to give him a share of the goods which he takes away from him. This is what equity and humanity would seem to oblige this first

executor to do, especially if he stood less in need of the goods of the succession than the second executor. We know by history that there have been several good moral heathens, who would not have failed to do so in the present case; and the spirit of the divine law, the first principles of which were unknown to them, does inspire much more strongly these sentiments into such persons as make it the rule of their actions. And it is only by the spirit of these principles that a full and perfect provision is made for every thing, and in such a manner that, whatever event happens, there cannot follow from it any consequences that may deserve the name of inconveniences.

VI.

3188. *The Executor is in general more favored than the Legatee.* — If the difficulty which may depend on the consideration of the persons happens to be between the executor and a legatee, so that all other considerations happen to be equal, and that, nothing deciding either for one or the other, the doubt is reduced to this single point, to know which of the two ought to be the most favored, it will be the executor. For besides that the testator has without doubt had a greater consideration for him than for the legatee, he is in the place of a debtor, and the legatee in place of the creditor; and in doubtful cases the condition of the debtor is always favored.[f] But if any circumstances render the condition of the legatee more favorable, they will make the preference of the executor to cease; which cannot be well understood but by examples, such as these that follow.

VII.

3189. *First Example of the Preference of the Executor.* — If a testator, who had two lands or tenements of the same name, but of different value, had devised one of them without distinguishing it from the other, naming it only by the name that was common to both, and without marking in any thing which of the two he had a mind to devise; the executor in this case would have the choice of them, and might retain the most precious to himself, and give that which is of the least value to the legatee. For the question would be altogether independent of all other considerations be-

[f] See the thirteenth and fifteenth articles of the second section of *Covenants*. See the articles which follow.

sides that of knowing who should have the choice, whether the executor or the legatee. Thus, in this precise doubt, which would depend barely upon knowing which of the two the testator had the greatest consideration for, the rule explained in the preceding article would decide it in favor of this executor.[g]

VIII.

3190. *Second Example.* — If a testator, having two or more silver basins of different values, had bequeathed one of them without specifying which, the executor might give only that of the least value; and by that he will have satisfied the legacy. And it would be the same thing if a testator, having two horses of the same name, as two coursers, or called by other proper names, had bequeathed a horse, calling him by his name.[h]

IX.

3191. *Third Example.* — If it happened that of one and the same testament there were two originals, which the testator had made at the same time, one to be deposited either in the hands of a notary public or some other person, and the other to be kept by himself; or that there were two engrossed copies of one and the same testament, the minutes or instructions of which had been lost by fire or some other accident, and that in one of the copies, or in one of the originals, the same legacy to one and the same person was of a lesser sum, and of a greater sum in the other original or copy, and that there appeared no rasure in the writing, nor any suspicion of alteration or forgery, the legatee could demand only one of the two sums, and that even the least. For this accident making it impossible to know the intention of the testator, thereby to decide which of the two sums the legatee might demand, and there being nothing to determine that the legatee ought to have the choice, the executor would have it, and would be bound only to give the lesser sum.[i]

X.

3192. *First Example where the Legatee is favored.* — We must not extend the rule explained in the sixth, seventh, eighth, and ninth

[g] *L.* 39, § 6, *D. de legat.* 1; — *l.* 17, § 1, *eod.*; — *l.* 32, § 1, *eod.* See the seventh section of the title of *Legacies.*

[h] *L.* 37, § 1, *D. de legat.* 1; — *l.* 32, § 1, *eod.*; — *v. l.* 4, *D. de trit. vin. vel ol. leg.* See the seventh section of the title of *Legacies.*

[i] *L.* 47, *D. de leg.* 2. See the seventeenth article of the first section.

articles beyond the cases of the said articles, or other cases of the like nature; for if other considerations may require an interpretation favorable for the legatee, or some other temperament between his interest and that of the executor, the disposition of the testator might be interpreted by these other considerations according to the circumstances. Thus, for example, if a testator had bequeathed a horse indefinitely and in general, or a watch, or a suit of hangings, since in all these things there are qualities altogether different, good and bad, the legacies of this kind being favors proportioned to the qualities of the testator and of the legatee, and to the other circumstances which may discover the intention of the testator, it would be contrary to the good will that the testator bore towards the legatee, to leave it to the choice of the executor to give the worst of the said things to the legatee; and it would be likewise contrary to the good intention which the testator had for the executor, to give the legatee power to choose the most precious individual of that kind of things that was bequeathed: which makes it necessary to regulate a legacy of this kind by a temperament that fixes between these extremities, equally unjust and opposite to the intention of the testator, a medium which may not be contrary either to the interest of the executor, or to the consideration which the testator had for the legatee. Thus, such a legacy would be moderated to a reasonable choice between the extremities of the best and the worst, to give to the legatee either a watch, or a horse, or a suit of hangings, or any other thing among several of the same kind, such as might be conformable to his circumstances, to those of the testator, to the goods of the succession, and to the other circumstances that might come into consideration for the regulating of the said temperament; whether it be that there were many of these sorts of things in the inheritance to choose out of, or that, there being no such things among the goods of the succession, the executor were obliged to procure them elsewhere.[1]

XI.

3193. *Second Example.* — The temperament which has been just now explained in the preceding article, for regulating these sorts of indefinite legacies by some medium between the opposite inter-

[1] *L.* 37, *D. de legat.* 1. See the following article. The rule explained in this article demands reflections that are not set down here, they being reserved for a more proper place. See the preamble of the seventh section of *Legacies*, and the first articles of this seventh section.

ests of the executor and legatee, is so natural and so reasonable, that it ought to be used likewise in the case of a legacy, where the executor is left at liberty to give out of several horses any one he pleases, or to give any one thing he thinks fit out of many of the same kind, which may be not only of different prices, but also of different qualities, good or bad; for this liberty would not extend so far as to give the executor power to give the worst of them all; but would leave him only the right to keep the best, and to give out of the middle sort one which the legatee could not reasonably refuse.[m]

XII.

3194. *The Third Example.* — If a testator had bequeathed a yearly pension or alimony to a legatee, to engage him to remain in company with another person that was dear to the said testator, whether it be that the legacy was conceived in terms that imposed that condition, or that it was said that the alimony or pension should be paid as long as the legatee tarried with the said person, and that the said person should happen to die before the legatee, who had lived with him until the time of his death; the pension or alimony would be continued, unless the expression of the testator showed clearly that it was his intention that the pension or alimony should cease after the said death. For besides the favorableness of a legacy of this kind, which is regularly understood to be during the whole life, it might be said that this legatee had performed that which the testator had in his view as the motive of the legacy. And it would be justly presumed even of the legacy of alimony, to be paid so long as the legatee should live with the said person, that the intention of the testator was only to oblige the legatee to continue with him as long as the said person should live.[n]

XIII.

3195. *Fourth Example.* — If he who had devised a land makes some addition to it, whether it be that he builds a house upon it, or that he adds to it some other piece of ground for the use of a service, or some other conveniency, these and other such like changes, which may increase either the value or extent of the thing

[m] *L.* 100, *D. de legat.* 1.

[n] *L.* 20, *D. de ann. leg. et fideicomm.*; — *l.* 13, § 1, *D. de alim. vel cib. legat.*, — *l.* 1, *C. de legat.* See the twelfth article of the fifth section of *Legacies.*

devised, will not have effect to revoke the legacy; but will show, on the contrary, that the testator had a mind to augment it. Thus, the expression of the testament, which did not comprehend this augmentation that is made afterwards, will be interpreted against the executor. Thus, on the contrary, if the testator had diminished the thing devised, as if he had alienated a part of the land devised, or pulled down a building in whole or in part, the legacy thereof would be diminished in so much.[o]

XIV.

3196. *Fifth Example.* — If a testator had left a legacy to a woman in case the first child she should have were a son, and it happened that she had at one birth a son and a daughter, and that by some chance it could not be known if the son had been born before or after the daughter, it would be presumed in favor of the legatee, that the condition had come to pass.[p]

REMARKS ON THE PRECEDING ARTICLE.

3197. Although this text be in the case of a legacy of liberty left to a slave, which made this disposition favorable; yet it seems that the decision ought to be the same in any other legacy that should depend on such a condition. For it would seem, moreover, that in the case of this text, although it should be certain that the son was born the last, yet it might be presumed that the testator, not foreseeing that the woman should have two children at one birth, had meant that, if she had a male child at her first delivery, the legacy should be due. And the literal interpretation, which would decide that, the son being born the last, the condition of the legacy had not happened, would appear a nicety opposite to the sense which might be naturally gathered from the intention of this testator, who had considered as the first child, not him that should be the first of two children at one and the same birth, but a male child that should be born at the woman's first delivery. This seems to be the manner in which reason and equity would interpret the intention of the testator in this doubt, if there should be any. *In re dubia benigniorem interpretationem sequi non minus justius est, quam tutius. L.* 3, *D. de his quæ in test. del.*

[o] *L.* 8, *D. de legat.* 1; — *l.* 24, §§ 3 *et* 4, *eod.*; — *l.* 10, *D. de legat.* 2. See the fourteenth article of the fifth section. See the fifth, sixth, seventh, and eighth articles of the fourth section of *Legacies.*

[p] *L.* 10, § 1, *D. de reb. dub.*

XV.

3198. *Sixth Example.* — When a testator bequeaths to a servant, or other person, the sum that shall be necessary to instruct him in a trade, it does not depend on the executor to limit the legacy to the trade that this legatee might learn at the cheapest rate: but it ought to be understood of the trade that will suit best with the quality, the age, the inclination, and the disposition of this legatee; unless it be that these circumstances should demand a trade wherein the apprenticeship would be so very expensive, that it might be judged by the quality of the testator, and quantity of his estate, that his intention restrained the legacy to an apprenticeship that should cost less.[q]

XVI.

3199. *Example of a Case where the Event changes the Disposition of the Testator.* — We have seen in the ninth article, that it may happen by some chance that it is not possible to know the intention of the testator; and it happens likewise by other sorts of events, that although this intention is perfectly known, and that we discover clearly all that the testator had in view, the event, which, instead of the case which he did foresee, produces another which his disposition did not comprehend, requires that it be regulated in a manner different from what the testator had ordered for the case that he did foresee. But here we ought to take his intention for our rule, and to order in the case that has happened what we judge the testator himself would have ordered, considering his intention in the case explained in his testament. Thus, for example, if a testator had ordered, that if, at the time of his death, he had one son, he should be his sole heir or executor, but that, if he had two sons, they should share equally his succession; that if there were two daughters, they should likewise divide his inheritance between them in two equal portions; and that if he had a son and a daughter, the son should have two thirds of his estate, and the daughter one third; and it happens that this testator leaves behind him two sons and one daughter, this unforeseen case ought to be regulated by the proportion that the testator had settled between the condition of the sons and that of the daughters, in the case where there should be one son and one daughter. And since his intention was, that a son should have

[q] *L.* 12, *D. de legat.* 3.

twice as much as a daughter, and that the condition of the sons should be equal, we ought to presume that, in the case of this event, he would have given according to the same proportion two fifths to each of his two sons, and one fifth to his daughter. And it is in this manner that the succession ought to be divided in this case.[r]

XVII.

3200. *Another Example of the same Kind.* — If a testator, not having as yet any children, had left his wife big with child, and had instituted her executrix together with the child that should be born, giving one third of his estate to the mother if it should be a son, and the half if it should be a daughter, and the wife was delivered both of a son and a daughter, the son would have one half, and the daughter and the mother would share the other half between them. And by this means the intention of this testator would be accomplished; for his will was that the son should have the double of what the mother had, and that the mother should have as much as the daughter.[s]

XVIII.

3201. *Another Example of the Interpretation of a Disposition in a Case unforeseen.* — If a testator who had two sons and a granddaughter by another son, having substituted his sons one to the other, in case the first who died should have no issue; and having substituted his granddaughter to them both, in case both the one and the other should die without children; it happened that one of the brothers died, leaving children behind him, and that the other brother, having outlived his nephews, died without children, the substitution of the granddaughter would have its effect with respect to him that died last. For although she was not called to

[r] *L.* 81, *D. de hæred. inst.* This manner of interpretation will agree to all the different combinations of other numbers of sons and daughters which a testator might leave behind him at his death; and the equity thereof is founded on the proportion which the testator himself had regulated. And although it is not certain to suppose that a testator will always observe the same proportion in all the possible combinations of the number of sons and daughters; and although he might augment or diminish the portions of the sons and daughters upon another foot, according to the differences of their number, and alter the said portions, yet we cannot enter into the conjectures of these changes, because they would have no certain foundation. So that this rule will be always just in the like cases. See the following article.

[s] See the same case explained for another use in the fifth article of the second section of the *Rules of Law.*

the substitution except in case the two brothers should die without children, and that this case had not happened; yet seeing in these sorts of dispositions it is the intention of the testator which ought to serve as a rule, we ought to presume that the testator, who had called his granddaughter to the succession of his two sons after him who should die last, if they both died without children, would have much rather directed in the case that has happened, if he had foreseen it, that she should succeed to this brother who died last. And it would be equally unreasonable and unjust, that she who, by the disposition of the grandfather, was to have both the portions, if her uncle who died last without children had succeeded to the uncle who died first, in case he had left no children, should be deprived of the portion of her uncle who died in the last place, to whom she was substituted, as well as to the other.[t]

XIX.

3202. *Another Example in an unforeseen Case.* — If a testator had instituted for his heir or executor the child who should be born of his daughter, then big with child, and before this testator had made his will his daughter was already brought to bed without his knowing any thing thereof, they not happening to meet together in the same place; this institution of a child to be born would have its effect for this child, although already born: for it was the same child on which this testator had a mind to settle his estate.[u]

XX.

3203. *Another Example in another Case unforeseen.* — We may add to the case explained in the preceding article another like to it, in that the terms in which the testator expresses himself do not agree with the event, but where his intention does nevertheless

[t] *L.* 57, § 1, *D. ad senat. Trebell.* We have set down in the case of this article, that the children of the brother who died first died before their uncle; for if they had survived their uncle, it might be said, according to the sentiments of one of the most learned interpreters who has commented on this text, that it would be very hard they should be excluded from the succession of their uncle by a cousin who was substituted to her uncles only in case both the one and the other should die without children. *V. l. pen. C. de impub. et al. subst.*

[u] *L.* 25, § 1, *D. de lib. et post. hæred. inst.* This example appears to be superfluous, for it is not possible it should enter the mind of any one to doubt of the decision. But seeing it is consonant to the law, and that it may be of use for the application of this rule to other cases that are less evident, we have thought fit to add it to the others.

serve as a rule. It is the case where a father who had only children under age had substituted one of his relations or friends to the child that should die the last, not having attained the age of puberty, that is, fourteen years complete in the male sex, and twelve in the female; which is done by that kind of substitution called pupillary, which shall be treated of in its place;[x] if it happened in this case that these two children died together, so that it could not be known if they died both at the same instant, or if one of the two had survived the other, this substitution would seem to cease, by the expression which called the person substituted to succeed only to him who should die the last, since it cannot be said of any one of the two that he died first or last. But because the intention of the testator was, that the survivor of the brothers should succeed to the other, and that the person substituted should inherit both the successions, in that which should fall last of all, the substitution to the longest liver includes the case where, the two dying together, neither of them outlives the other: for neither of them remains to exclude the person substituted; and with regard to him, both the one and the other may be considered as dead in the first place, and as dead in the last place, since neither of them died before the other, nor after the other.[y]

XXI.

3204. *Another Example.* — If a testator, who had no child, had instituted him that should be born of his marriage, or had made some other disposition in favor of the said child; as if he had added to the said institution, that, if he had several children, they should all be his heirs or executors, and that the eldest should have something over and above his equal share with the others, which he should explain; and it happened that the wife of the said testator being dead, without leaving him any children, he had married another, by whom he had children; these bequests would have, with respect to them, the effect which they would have for the children of the first marriage, if there had been any. For the intention of this testator had in view the children which he might have afterwards.[z]

[x] See the second title of the fifth book.

[y] *L.* 34, *D. de vulg. et pup. subst.*; — *l.* 11, *D. ae bon. poss. sec. tabul.*; — *l.* 9, *D. de reb. dub.*

[z] *Ll.* 4 *et* 5, *D. de lib. et post. hæred. inst.*

Remarks on the Preceding Article.

3205. We have added to the case explained in the text cited, which relates only to the simple institution of the heir or executor, the case of some advantage left to the eldest son over and above his equal share with the other children. For if there were only a bare institution of a child, or of several children, it would be the same thing for making them succeed as heirs to their father, whether there were any testament or not. So that what is remarkable in this text consists in this, to show that the disposition of the father, of which it might be doubted whether, the same being made with a view to children of the first marriage, it should have its effect with regard to those of a second, ought to be executed in favor of the children of this second marriage, as it would have been for those of the first marriage, if there had been any issue by it. And as to the liberty of instituting a posthumous child, which seems to be the principal subject of this text, we have inserted nothing thereof in this article; because we have spoken of it in its proper place in the twenty-second article of the second section of *Testaments*, and in the thirteenth article of the second section of *Heirs and Executors* in general.

XXII.

3206. *The Validity of a Bequest is independent of the Motive explained by the Testator.* — When a testator has fully explained himself, either as to the institution of the executor, or devise of a legacy, and that he adds thereto some motive of his disposition, the said disposition will nevertheless have its effect, although it should be found that the fact explained by the testator, as his motive, were not true. Thus, for example, if the testator had said, I give to such a one, because he has done me such a piece of service; although this service had not been done, yet the will of the testator, which would be sufficient alone, although he should give no reason for it, would make this bequest valid; and the motive that is added thereto marks only either that the testator has been deceived, or that he had a mind to make his bequest more favorable. But if he had explained his motive in such a manner, that it appeared that his intention was to make it a condition on which the effect of his bequest should depend; as if he had said, My will is, that there be paid to such a one the sum of so much, in case it shall appear that he has done such a business, or on condition that

he do it; these bequests, and others of the like kind, would be conditional, and would depend on the execution of that which the testator had explained.[a]

XXIII.

3207. *Dispositions of Testators which are not to be executed.* — Sometimes it is necessary not to follow the dispositions of the testator, although he has clearly enough explained his intention; whether it be that there was ground to presume that he was ignorant of some fact, the knowledge of which would have obliged him to make another disposition, or because what he had ordered was really unjust or unreasonable. Thus, for example, if the testator had named one to be tutor to his children, or to have the care of their education, whom the relations and the judge knew to be so unfit for it, that this choice ought not to be confirmed; or if a testator had directed extravagant expenses for his burying, or if he had made any dispositions contrary to good manners, or even to good sense, by some folly; all such sorts of dispositions would not be executed. And a proper provision would be made for the guardianship of the children, the funeral expenses, or other things necessary to be regulated, either by the testator's relations, or the judge, according to the quality and circumstances of the fact.[b]

XXIV.

3208. *In what Sense Testators may, or may not, derogate from the Laws.* — The rules which declare that testators cannot, by any clause in their testaments, exempt their dispositions from being subject to the law, nor order any thing therein contrary to law,[c] ought to be understood only of dispositions which some law had rendered illegal, and which should be contrary to the spirit of the law. Thus, for example, it would be to no purpose for a testator to ordain that his testament should not be null, although he had called only three witnesses to attest it. Thus, it would signify nothing to impose either upon his executor or a legatee a condition which the law would not allow him to perform; as if he should bequeath any thing to an infant, on condition that he

[a] *L.* 17, § 2, *D. de condit. et demonst.*; — *l.* 72, § 6, *eod.*; — *d. l.* 17, § 3. See the tenth and eleventh articles of the eighth section.

[b] *L.* 10, *D. de confirm. tut.*; — *l.* 7, *in f. D. de ann. legat. et fid.*; — *l.* 14, § 6, *in f. D. de relig.*; — *l.* 113, § *ult. D. de legat.*

[c] *L.* 55, *D. de legat.* 1.

should marry before he were fourteen years of age. Thus, a testator cannot forbid his heir or executor to take that quality upon him with the benefit of an inventory. For all these dispositions would be directly contrary both to the letter and spirit of the law, and of no other use but to gratify a fantastic humor. But if a disposition of a testator should derogate from the provision of any law, only in a case where the spirit of the law would not be transgressed, and upon a motive which the laws would not disapprove of, such sorts of dispositions would have nothing in them contrary to law, and therefore would subsist. Thus, for example, although the laws ordain that the father shall have the usufruct of the goods acquired by his son that is not emancipated, yet they permit a testator, who has a mind to leave a legacy to a son that is under his father's power, to deprive the father of the legatee of his right to the usufruct of the thing bequeathed.[d] Thus, although the law does not allow minors to oblige themselves, nor alienate their goods during their minority, yet if a testator had left to a minor either a sum of money or other thing, on condition that he should become bound to one of the creditors of this testator, or that he should sell one of his lands or tenements for a certain price to a person named in the testament; these conditions would have their effect, and the infant legatee who should accept of this legacy would be bound to perform them, without being able to free himself from them under pretext of his minority, except by renouncing the legacy, in case the said conditions should make it disadvantageous. Thus, in general, in all the cases where the point in question is to know whether the clause of a testament which seems opposite to some law, or to derogate from it, ought to subsist, we ought to judge thereof by the spirit of the said rule, by distinguishing that which of itself is illegal, or contrary to the provision of some law, understood according to its intention, according to its spirit, and according to its motive, from that which may have its effect without transgressing the spirit of the law, although it may be in appearance contrary to the terms thereof.

XXV.

3209. *Two Different Testaments that subsist.* — If there should be found two different testaments of one and the same person, of the same date, and both in due form, and in the one the testator

[d] *Nov.* 117, *c.* 1.

had named other executors than those named in the other; these two testaments would only make one which should subsist, and all these several executors would divide the succession among them. For these testaments being made at the same time, neither of the two would be revoked by the other. And it would be presumed either that the testator had a mind to keep secret the dispositions of one of these testaments, showing only the other, or that some other motive had engaged him to divide them.[e]

XXVI.

3210. *Divers Views for the Interpretation of Testaments.* — It follows from the rules explained in this and the foregoing section, that the doubts which may arise in testaments are decided differently, according to the different causes from whence they may proceed; according to the different presumptions whereby we may judge of the intention of the testator, either by discovering what he had in his view, or even supplying that in the cases where any of the rules that have been just now explained may oblige us to do it; according as the dispositions of the testaments are conformable to the laws, or are contrary thereto; and according to the other views that the several rules may give, and the circumstances demand. Thus, sometimes it is necessary to observe literally the terms of the expressions, and sometimes they ought to be interpreted either by a temperament of equity when they will admit thereof, and when it is necessary;[f] or by the consideration of one of the persons interested, if the case is such that this consideration ought to be of any weight.[g] Thus, when the difficulty arises from the very words of the testator, it ought to be resolved by the rules explained in the foregoing section. And if it proceeds from anywhere else besides the testament, and some unforeseen accident has given occasion to it, it ought to be decided in the manner that equity tells us the testator himself would have decided it,[h] pursuant to the rules which have been just now explained. And in general, it is the duty of the judge, and his wisdom will direct him, to apply in every case the rules that are most suitable to it.[i]

[e] *L.* 1, § 6, *D. de bonor. poss. sec. tab.*

[f] *L.* 3, *D. de his quæ in testam. delent.*; — *l.* 10, *in f. D. de reb. dub.*

[g] See the second article, and those which follow.

[h] *L.* 16, *D. de condit. et demonstr.*

[i] *L.* 7, *C. de fideic.* See the last article of the preceding section.

SECTION VIII.

OF THE CONDITIONS, CHARGES, DESTINATIONS, MOTIVES, DESCRIPTIONS, AND TERMS OF TIME, WHICH TESTATORS MAY ADD TO THEIR DISPOSITIONS.

3211. SINCE the dispositions of testators ought to be proportioned to their intentions, which they ought to explain, and the said intentions are diversified according to the different views which they may have from the conjunctures in which they happen to be, and the different regards which they ought to have to the circumstances which they are to consider, and to the events which they are to foresee; this diversity obliges them to take different precautions for the execution of their wills. And it is this that has naturally given rise to the use of conditions, charges, and other additions to bequests in testaments, which shall be the subject-matter of this section. Thus, the rules which are here explained, as well as those of the foregoing sections, relate to all sorts of dispositions in prospect of death, institutions of executors, substitutions, legacies, and others, according as each rule may be applied, either to all these sorts of dispositions, or to some of them.

ART. I.

3212. *Definition of Conditions in Testaments.* — Conditions in testaments are particular dispositions, which are part of the other dispositions of the testator, and which he adds to them in order to regulate the effect which he is willing they should have, if a case which he foresees does or does not happen; whether it be that he makes the validity of what he orders in this manner to depend on this event, or that he is only willing to make some change therein, according to the case that shall happen. Thus, for example, a testator may bequeath a marriage-portion to his daughter in case she marries, and this legacy will depend on the event of her marriage, and will not have its effect till she does marry. Thus, a testator may devise a land or tenement on condition that, if the legatee leaves children behind him, he shall have the property thereof, and transmit it to them; and that if he has no children, he shall only have the bare usufruct of it, and that after his death the property shall go to another: which will make this legacy to have different

effects, according as it happens that the legatee has children or has none.[a]

II.

3213. *Definition of Charges.* — Charges are engagements which the testator imposes on his executor or other person to whom he leaves any thing by his will; as if he charges his executor, or a legatee, with the usufruct of some land or tenement, with a service, with an annuity, in favor of a third person.[b]

III.

3214. *Definition of Destinations.* — Destinations are directions given by the testator, whereby he appropriates to certain uses the things which he bequeaths. Thus, for instance, if a testator leaves a sum of money to a hospital, to be laid out on a building, or on movables, or some other thing, this is a destination which he makes of this legacy.[c]

IV.

3215. *Definition of Motives.* — Motives are the causes which testators sometimes express as the reason that has induced them to make certain bequests; and they are of two kinds. One is of the motives which relate to the time past, and which precede the disposition of the testator; and the other is of the motives which regard a fact that is to come, the hope and expectation of which engage the testator to make some disposition. Thus, for the time past, the considerations of affection, esteem, and gratitude for good offices and services done, are motives which engage one to name an executor, or to leave a legacy.[d] Thus, for the time to come, the hope or expectation that a relation and friend of the testator's will be willing to take upon him the guardianship of his children, is a motive which engages the testator to leave him a legacy. And these motives, whether for the time past or the time to come, may make the dispositions conditional, or may not have that effect, according as the testator shall have declared his intention; as shall be explained hereafter.[e]

[a] *L.* 2, *D. de condit. et dem.* See what has been said of conditions in covenants, in the fourth section of *Covenants.*

[b] *L.* 15, *D. de usu et usufr. leg.*; — *l.* 36, *D de condit. et dem.*

[c] *L.* 17, § *ult. D. de condit. et dem.*

[d] § 31, *Inst. de leg.*

[e] See the tenth article.

V.

3216. *Definition of Description.* — Description is an expression which the testator makes use of instead of the name of the person or thing which he means, or which he adds to specify it more expressly, and to distinguish it. As if, instead of naming an executor or a legatee, he describes him by his quality; if he gives to the eldest son of such a one; if, having devised an estate, he adds its situation and its bounds; if, having bequeathed a picture of such a history, he adds the name of the painter, or mentions from whom he had the picture.[f]

VI.

3217. *Definition of the Terms of Time.* — The terms of time are the delays which the testator adds to his dispositions, whether it be to defer the execution of them, or to make their validity to depend thereon, as shall be explained in the twelfth article. And these terms or delays are of two sorts; one is of a certain time, as to the first day of such a year, or within so many years to be reckoned from such a day;[g] the other of an uncertain time, as at the time of the death of some person, or at the time of his marriage.[h]

VII.

3218. *The Charges, Destinations, and Conditions are often confounded together.* — Although the conditions, the charges, and destinations are distinguished in the manner that has been just now explained, yet, as the word *condition* is commonly used in our language, it comprehends often the charges and destinations; and the word *charge* takes in likewise the conditions. Thus, it is said of a legacy or devise, that charges the devisee of a land or tenement with a service, that this devise is left on condition that the said devisee should suffer such a service; thus it is said of the legacy of a sum of money destined for a building, that the said legacy is left on condition that the legatee should build. Thus we say of a legacy left on condition that the legatee should restore to the executor a certain writing, a movable, or other thing, that this legacy is left with the charge of restoring the said writing or movable. And, in fine, it is said of a legacy destined for

[f] *L.* 34, *D. de cond. et dem.*; — *l.* 17, *D. de condit. et dem.* See the eleventh article.
[g] *L.* 30, *D. de legat.* 1.
[h] *L.* 1, § 2, *D. de cond. et dem.* See the twelfth and thirteenth articles.

some purchase, or for some work, that it is left with this charge, or upon this condition, that the said purchase or work be made or done by him who is charged with it. But we must take care with respect to this usage which confounds these words in one and the same sense, that we do not, for all that, confound charges, destinations, and conditions together; for although they have often the same effect, yet their natures are different; which it is necessary to distinguish for the right use of the rules,[i] as will appear by the following articles.

VIII.

3219. *The Charges may be conceived either as Conditions, or simply as Charges.* — The charges may be conceived two ways: one, in such a manner that they may make in reality conditions on which the effect of the testator's dispositions may depend; and the other, so as not to have the use of conditions. Thus, for example, if a testator bequeaths to a creditor of one of his friends a sum of money, or some other thing, with charge to the said legatee to restore to the said friend the bond or obligation of what he owes him, or with charge to desist from a lawsuit which he has commenced against him; these charges make the said legacy conditional, and are in effect conditions, without the performance of which the legatee shall have no part of the legacy. But if a testator devises an estate of a thousand livres yearly income, with the charge of paying out of it every year a rent of two hundred livres for a foundation; this charge will not be a condition upon which the effect of the said devise will depend, but will only give to those to whom this rent ought to be paid a right to distrain the fruits of the said estate, and the other goods of the legatee, if, having accepted the legacy, he does not acquit the charge.[l]

IX.

3220. *The Destinations may, or may not, have the Effect of Conditions.* — The destinations, as well as the charges, may be conceived either in terms which make them to be a condition, or to have the effect thereof; or in other terms, and without this effect. Thus, for instance, if a testator charges his executors to give a sum of money to a young woman when she marries, to be to

[i] See the following articles. The usage of these words, *charges* and *conditions*, is commonly confounded in our language.

[l] This is a consequence of the preceding articles.

her instead of a marriage portion, this destination will have the effect of a condition; and if this young woman does not marry, or if she dies before she is of age to marry, this legacy will be null.[m] Thus, on the contrary, if a testator leaves a sum of money to a hospital, to be laid out there on some edifice; although this edifice should happen to be built by some other means, or should not be necessary to the said hospital, yet this destination would be no obstacle why the sum should not be due, that it may be laid out upon some other work, of an equal or greater advantage for the said house: for the intention of the testator was not that this donation should have the effect to make the legacy conditional.[n]

X.

3221. *The Motive may either be in the Stead of Conditions, or not have the Effect thereof.* — The motives, as well as the charges and destinations, may be conceived either in terms which make them to have the effect of a condition, or in such terms that make them not to be considered as a condition; whether it be that the said motive respect the time past, or the time to come. Thus, for example, for the time past, if a testator bequeaths a sum of money to one of his friends, because he has taken care of his affairs, this legacy will not be conditional: and although this legatee may not have taken this care, yet the legacy will nevertheless be due,[o] according to the rule explained in the twenty-second article of the seventh section. But if the testator has explained this motive in the terms of a condition, the legacy will not be due unless it appears that the legatee has satisfied it; as if the testator had said, I bequeath to such a one, if it shall appear that he has done such a business.[p] And it is by the expression of the testator, and by the circumstances, that we are to judge whether these sorts of legacies are pure and simple, or whether they are conditional.[q] Thus, with respect to the time to come, if a testator bequeaths to one of his relations or friends a sum of money to be paid after his death, adding to the legacy, that he hopes the legatee

[m] *L.* 1, *C. de his quæ sub. mod.*

[n] *L.* 4, *D. de adm. rer. ad civit. pert.*

[o] § 31, *Inst. de legat.*

[p] Sed si conditionaliter enuntiata fuerit causa, aliud juris est. Veluti, hoc modo, Titio si negotia mea curavit, fundum meum do, lego. *D.* § 31, *in f.*; — *l.* 17, § 3, *D. de cond. et dem.*

[q] *L.* 72, § 6, *D. de condit. et dem.*

will assist the testator's children with his counsel and good offices when there shall be occasion; this motive will oblige the legatee only in point of honor, and this legacy, which is payable before the said good offices, will not be revoked, although they are not performed. But if a testator leaves a sum of money to an attorney or solicitor, that he may take care of instructing and soliciting a lawsuit, that is either already commenced or to be commenced, this motive will be instead of a condition; and this legatee will not be entitled to the legacy, unless he perform the condition according to the will of the testator, and the state of things. Thus, for another example, if a testator leaves a sum of money to one of his relations or friends, to engage him to accept the guardianship of his children, and the legatee refuses it, he shall have no right to the legacy.[r]

XI.

3222. *The Descriptions may sometimes imply a Condition.* — Descriptions do not usually imply a condition, but are distinguished from conditions in this, that they for the most part have regard to the past and present time, whereas the greatest part of conditions respect the time to come.[s] But there may be descriptions conceived in terms which give them the nature of conditions. Thus, there is no condition when a testator, the better to describe a land or tenement that is devised, and sufficiently specified, adds that it is the land or tenement which he purchased of such a one, or that such a one gave him; and this legacy is independent of the truth of this description, so that although it were false, yet the legacy would nevertheless have its effect: for the testator may have been deceived as to these circumstances; and it is sufficient that what he had a mind to give is well enough known otherwise.[t] Thus, on the contrary, if a testator had bequeathed that which was due to him by a debtor whom he named, this legacy would imply the condition that there was a debt owing, and if nothing was due, the legacy would be null. Thus, in like manner, if a testator had bequeathed the fruits that should be gathered in such a ground the year of his death, this description would imply the condition that there should be some crop, and if there were none, the legacy would be without any effect.[u] But if the testator, having be-

[r] *L.* 111, *D. de legat.* 1.
[s] *L.* 34, § 1, *D. de condit. et dem.*
[t] *D. l.* 34, *D. de condit. et dem.*; — *l.* 17, *eod.*
[u] *L.* 75, § 1, *D. de leg.* 1; — *l.* 1, § *ult. D. de condit. et dem.*

queathed a sum of money, should add afterwards that the said sum should be paid to the legatee out of the produce of such a crop, or out of the moneys which should be found in such a place; these descriptions, being added only to show his heirs or executors whence they might easily pay the said legacy, would not make it conditional, unless they were expressed in such terms as might make one judge that the testator had a mind to bequeath only what could be made of such a crop, or other thing, which he had thus specified.[x]

XII.

3223. *The Term of an Uncertain Time makes the Legacy conditional. — Example.* — The terms of legacies fixed to a certain day, such as the first day of such a year, or within such a time, do not make a condition on which the legacy may depend; and the effect of these terms is only to defer the delivery of the legacy, the right of which is already acquired to the legatee, and which, were it not for the term, would be due instantly;[y] but the term of an uncertain day implies a condition on which the legacy depends. Thus, for example, if a testator bequeaths any thing to an infant when he shall have attained the age of fourteen or one-and-twenty years complete, to a friend when he shall purchase such an office, to a young woman when she shall be married; these legacies imply the condition that the said time shall happen, that the legatee shall be of age, that he shall purchase such an office, that the young woman shall be married; and this condition is the same as if the testator had left the legacy in case the legatee should live to that term, and that, if he died before, the legacy should be null.[z] Thus, we must not confound the legacies which are made payable at an uncertain time with the legacies payable at a certain term.

XIII.

3224. *Another Example.* — The uncertainty of the times on which depend the legacies explained in the foregoing article consists in this, that it is uncertain if those times will ever happen; for

[x] *L.* 96, *D. de leg.* 1; — *l.* 26, *D. quand. dies leg. ced.*

[y] *L.* 21, *D. quand. dies leg. vel fid. ced.*

[z] *L.* 75, *de cond. et dem.*; — *l.* 21, *D. quand. dies legat. ced.*; — *l.* 22, *eod.*; — *v. l. un.* § 7, *C. de caduc. toll.* See the following article, with the remark on it, and the sixteenth article of the ninth section of *Legacies*. See, touching legacies at the age of fourteen years, the same sixteenth article of the ninth section of *Legacies*, and the remark that is there made on it.

it may not happen that the legatee lives to be of age, or that he has such an office, or that a young woman marries. But there are times uncertain in another manner, although it be certain that they will happen, and which do nevertheless make the disposition of the testator to be conditional; as, for instance, if he charges his heir or executor to restore at his death either the whole inheritance, or a certain land or tenement, to another person: for in this case, although it is certain that the time of the death of this heir or executor will happen, yet since it is uncertain, if, when it does happen, the person in whose favor the said disposition is made is not dead, this uncertainty renders the disposition conditional, and implies the condition that this person do survive the said heir or executor.[a]

Remarks on the Preceding Article.

3225. We have not put down in the article what is said in the last of the texts cited, that the legacy due at the time of the legatee's death is not conditional, and that he transmits it to his heir or executor. For it does not seem probable that it will ever come into any one's mind to leave a legacy so useless to the legatee, and of which no one could have any benefit except the legatee's heir or executor, who perhaps might be no relation to the testator, nor so much as known to him. And if the testator had a mind to leave only to the children of this legatee, and after his death, he would have expressed himself in another manner. But although this case should never happen, yet we make this remark here on occasion of this text, that we may add at the same time the reason why the uncertainty of the time of the legatee's death does not make the legacy conditional, as the uncertainty of the time of the executor's death does. Which proceeds from this, that, in the case of a legacy due at the time of the executor's death, it may happen that the legatee may die before him, in which case there will be neither legacy nor legatee; whereas, in the case of a legacy due at the time of the legatee's death, it cannot happen that the legatee should die before the time in which the legacy ought to begin to have its effect, which is the time in which he dies. Thus, it will be in the last moment that he passes from life to death that this legacy will have its effect, to pass from the legatee to his heir or executor.

[a] *L.* 79, § 1, *D. de condit. et dem.*; —*l.* 1, § 2, *D. eod.*; —*l.* 4, *D. quando dies legat. vel fideic. ced.* See the seventeenth article of the ninth section of *Legacies*.

XIV.

3226. *It is necessary to distinguish the Different Sorts of Dispositions, to be able to judge aright of them.* — It follows from these different manners in which testators may diversify their dispositions, that, in all the cases where the question is to interpret any of them, it is necessary to examine its nature, to know whether it is pure and simple, or conditional, and whether it contains any of the other characters which have been just now mentioned, in order to discover by the said characters, and by the expressions of the testator, what may have been his intention, and how his disposition ought to be executed.[b] Which depends on the preceding rules, and those that follow, and which relate chiefly to conditions.

XV.

3227. *Three Sorts of Conditions with Respect to the Divers Sorts of Facts or Events on which they depend.* — Conditions are of several sorts, and may be distinguished into different classes, according to the different views under which they are considered. If we consider them with respect to the divers sorts of facts or events on which they depend, there are three sorts of them. The first is of those which depend solely on the act of the person to whom the condition is enjoined; the second, of those which depend on events in which the act of that person has no share; and the third is of those which depend partly on the act of the said person, and partly on an event that is independent of his act. The condition, that a legatee shall give a sum of money, do some work, discharge what is owing him by one of his debtors, that he shall not raise a building so high as to prejudice the light and prospect of a house belonging to a friend of the testator's, and such other like conditions, are of the first of these three kinds. A legacy of a sum of money, on condition that there be so much clear got of a lawsuit that is still depending, or in a commerce which is not as yet ended, would be of the second kind. And we may give for an example of the third sort, the condition imposed on a legatee to buy a house of a third person, either in order to give it to some other person, or to fit up an apartment in it for a hospital; for this condition would depend partly on the act of him on whom it was imposed, and partly on the will of the owner of the said house, or perhaps even on a casualty, which might render it

[b] This is a consequence of the preceding rules. See the articles which follow.

impossible. As if the situation of the said house should expose it, together with the ground on which it stood, to be destroyed by the overflowing of a river, or by a torrent, and that in fact the house and ground should happen to perish.[c]

XVI.

3228. *Three Sorts of Conditions with Respect to Time.* — Conditions may likewise be distinguished into three kinds, according to the times to which they may have relation. One is of those which respect the time past; as if a testator bequeaths a sum of money, in case the same shall be found to be due to him from a business already begun in his absence by some friend of his whom he had intrusted with it, but the event of which he does not as yet know. The second kind is of the conditions which relate to the present time; as if a testator leaves a legacy to a stranger or alien, in case he be naturalized at the time of making the testament, or at the time of the testator's death, which will be the present time of the succession's being open. The third is of conditions which have respect to the time to come; as if a testator leaves a legacy in case the legatee shall happen to purchase an office. But it is only, properly speaking, this third kind which has the true character of a condition, which is to suspend, until the same does happen, the disposition of the testator which depended on it: whereas the conditions which relate either to the time past or present do not suspend any thing; and at the moment of making the testament, or of the death of the testator, it is then determined either that the disposition is null if the condition has not happened, or if it has happened, that the legacy shall have its effect. And there is nothing in suspense but the knowledge whether it has happened or not.[d]

XVII.

3229. *Two Sorts of Conditions, Express and Tacit.* — We must likewise distinguish, under another view, two sorts of conditions, which comprehend them all. One is of those which are express, and the other of those which are called tacit. The express conditions are all those which the testators express in terms of conditions, or other terms equivalent; and those conditions are called tacit, which, without being expressed, are tacitly implied in the

[c] *L.* 60, *D. de condit. et demon.*

[d] *L.* 16, *D. de inj. rupt.*; — *l.* 3, § 13, *D. de bon. libert.*; — *l.* 10, *in f. D. de condit. inst.*

clauses of the testament. Thus, when a testator bequeaths the fruits of a ground, or such a year, or the profits which arise from such an affair, these sorts of legacies imply the tacit condition, that there shall be fruits gathered in the said ground, and that some profit shall be made of the said affair when it shall be ended.[e] But these sorts of conditions which are implied do not make the legacies of this kind conditional with this effect, so as to make the right of the legatee to depend on them. For before that it be certain, in the case of the legacy of a crop, whether there will be any fruits, or not; and in the case of the legacy of the profits arising from such a business, whether there will be profit or loss thereby; the legatee has acquired his right to what fruit the ground may produce, or to what profit may arise from the said business. And the legatee has so fully acquired this right before the event gives him the use of the legacy, that, if he should happen to die in the mean while, he would transmit his right to his heir. So that the effect of this condition is not such as that the validity of the legacy depends thereon, but it is only such that the legacy, without being null, may happen to be of no manner of profit to the legatee.[f]

XVIII.

3230. *Impossible Conditions.* — Another kind of conditions is made up of those which are impossible. And we must reckon in this number, not only that which is impossible by nature, but likewise that which is contrary to law, good manners, or decency. As, for example, if a testator had bequeathed a marriage portion to a young woman of ten years of age, on condition that she should marry within a year; or if he had left a legacy, on condition that the legatee should fix his domicile in a certain place. For the condition of this marriage would be contrary to law; and that of fixing his domicile in a certain place, being contrary to the just and natural liberty that every one has to choose his dwelling-place, would be in some manner contrary to good manners and decency. Thus, these sorts of conditions oblige to nothing at all, no more than those which are naturally impossible, and they are held to be the same as if they were not written. For that is considered as impossible which cannot be done without breach of the law, or of good manners and decency. And if there were in a testament

[e] *L.* 1, § *ult. D. de condit. et dem.*

[f] *L.* 99, *D. de condit. et dem.*

conditions either naturally impossible, or contrary to law and good manners, the dispositions which the testator should make to depend on them would nevertheless have their effect, although these conditions should have none.[g]

XIX.

3231. *Another Kind of Impossible Conditions.* — There may be conditions which, without being naturally impossible, and without having any thing in them contrary to law and good manners, cannot be fulfilled, because of some event which makes the performance of them impossible: and in that case, the disposition which depended on such a condition will have its effect, or will not have it, according as the quality of the condition may mark what was the intention of the testator. Thus, for example, if a testator had devised a tenement, or other thing, on condition that the legatee should give a sum of money to some person before the legacy should be delivered to him, and that the said person should happen to die before the testator; the non-performance of such a condition, that is become impossible, would be of no prejudice to the legacy, and the legatee would have it without paying the sum of money: for the intention of this testator was to leave two legacies; one to this legatee, and the other to that person. So that the fruitfulness of the one legacy does not annul the other, no more than in the cases of the twenty-ninth article.[h] Thus, on the contrary, if a testator had left a legacy to a young woman, in case she should happen to be married to such a relation or friend of the testator's, and the said relation or friend should chance to die before the said marriage, the legacy would be null. For the intention of this testator had for its object only this marriage.[i]

XX.

3232. *Dispositions made with a View to procure others are Unlawful.* — We ought to reckon among the conditions that are contrary to good manners, those which a testator adds to a disposition in favor of some person, in order to procure to himself the like benefit. As if he should institute such a one for his heir or execu-

[g] *L.* 3, *D. de condit. et dem.*; — *l.* 1, *D. de condit. inst.*; — *l.* 14, *D. eod.*; — *l.* 71, § 2, *D. de condit. et demonstr.*; — *l.* 15, *D. de condit. inst.* See the twelfth article of the fourth section of *Covenants.*

[h] See the twenty-ninth article of this section.

[i] *L.* 4, *C. de condit. inst. tam legat. quam fid.*; — *v. D. de condit. et dem.*

tor, in case the said person hath, on his part, named this testator to be his heir or executor. And it would be the same thing in a legacy left on such a condition. And, in general, in what manner soever those dispositions are conceived which tend to the procuring of others from those persons in whose favor they are made, whether it be that the testator expects the said dispositions to be made in his own favor, or in favor of other persons; or that he gives to one person, in order to get from another; all these kinds of dispositions are contrary to good manners, and are unlawful.[1]

Remarks on the Preceding Article.

3233. These sorts of dispositions, so mean and sordid, which are mentioned in this article, must needs have been very frequent at Rome, seeing it was necessary to have a law to repress them, which was a decree of the senate, of which mention is made in the texts cited on this article. This rule is not very necessary with us; for although we have other unfair ways enough practised among us, in order to procure favorable dispositions from testators, yet we see but few persons who think of laying such snares as these, and as few who suffer themselves to be caught in them.

3234. We are not to reckon in the number of the dispositions spoken of in this article, the mutual testaments of two persons, who institute reciprocally one another heir or executor; for neither of the two anticipates the will of the other, in order to procure the said institution in his favor; but both the one and the other having a reciprocal affection, which can only proceed from just causes, there is no reason why the one and the other should not express it by such an institution as this is. And it is expressly enough approved of by these words of the first of the texts cited on this article:— *Non eas (institutiones) senatus improbavit quæ mutuis affectionibus judicia provocaverunt.* It is for these reasons that the reciprocal testaments have been approved of by the novel of the Emperor Valentinian, *De Testamentis*, and by our usage, and likewise between husband and wife in some customs.

XXI.

3235. *Not those which are made as an Acknowledgment of a Former Benefit.* — If the testator did not make his disposition in

[1] *L.* 70, *D. de hæred. instit.*; — *l.* 11, *C. de test. mil.*; — *l.* 1, *in f. D. de his quæ pro non script.*; — *l.* 64, *D. de leg.* 1; — *l.* 71, § 1, *D. de hæred. instit.*; — *v. l.* 2, *eod.*; — *l.* 29, *eod.*

favor of a person to depend on what he should expect from him; but that having known, for example, that a person had left him something by his testament, he, on his part, out of a sense of gratitude, should leave something to the said person, or to some of his children or friends, on his account; such a bequest, not being made with a view to procure the like from the said person, would have nothing unlawful in it.[m]

XXII.

3236. *One or more Conditions of the same Disposition.* — Since conditions depend on the will of the testator, and are arbitrary, one may make a disposition to depend, not only on one, but on more conditions, whether they be in relation to a fact in the power of the person whom the said disposition concerns, or of another nature. And if there be several conditions joined together, so as that the testator imposes them all together, the fulfilling of one of the conditions will not be sufficient to validate a bequest which depends on the accomplishment of them all. But if it depends only upon one or other, the accomplishment of the first will give it the effect which it ought to have.[n]

XXIII.

3237. *The Will of the Testator is the First Rule whereby to interpret the Conditions, and other Sorts of Dispositions.* — In all the cases where there may arise difficulties concerning conditions, charges, destinations, motives, descriptions, and terms of time, the first general rule, and which is common to all these sorts of difficulties, is always the will of the testator. Thus, it is by the knowledge that we may have of his intention, that we are to regu-

[m] *L.* 71, *D. de hæred. inst.* In the article we have not made use of the expression instanced in this text, *I institute such a one my heir or executor, for the same share or portion that another has instituted me his heir or executor.* For although the said disposition does not seem to be made with a design to procure another, and that, on the contrary, it seems to presuppose the other to be already made; yet, seeing it may have relation to the testament of a person who is still alive, and who may make another, and seeing it implies the condition that this testator shall be heir or executor to the other, since he gives only in proportion to what the other shall have left him; such a disposition as this does not seem to be very decent, and is not agreeable to our usage. Wherefore we have put down in the article another case, which may suit with our usage, and which points out the character by which we are to distinguish, in dispositions which are relative to others, those which may be reckoned lawful from those which are not, according to the principles explained in this and the foregoing texts.

[n] *L.* 5, *D. de condit. inst.*

late them.[o] And the use of this general rule depends in particular on the preceding rules, and those which follow.

XXIV.

3238. *Conditions which depend on the Act of the Executor or Legatee.* — The conditions which depend solely on the act of the person to whom the testator has enjoined them ought to be fulfilled in the manner that he has regulated, and as soon as they can conveniently be performed. And his disposition hath its effect, or ceaseth to have it, according as the said person accomplisheth or doth not accomplish the condition, whether it consist in doing or not doing, in acquitting or giving, or in suffering some charge, or what other nature soever it be of, provided only that the condition have nothing in it that is impossible, or contrary to law and good manners.[p]

XXV.

3239. *Condition of not doing Something.* — As to the conditions which oblige not to do something; as, for instance, not to raise a building so high as to hinder the light or prospect of a house, provision ought to be made for the security of the person interested, according to the nature of the condition, whether it be by the bare submission of the person on whom the condition is imposed, or otherwise, according to the circumstances.[q]

XXVI.

3240. *Conditions which do not depend on the Act of the Executor or Legatee.* — The conditions which depend upon events, in which the act of the heir or executor, or legatee, has no share, have their effect by the event itself, whenever the case happens, or fails to have it, if the case does not happen.[r] Thus, for example, a legacy of a sum of money, upon condition that so much clear gain shall be made by a business or commerce that is not as yet ended, will be in suspense until the event; and if there be any clear profit, the legacy will have its effect, either in whole or in part, according to the quantity of the profit that is made, or will remain without effect, if there be no profit at all.

[o] *L.* 19, *D. de condit. et dem.*

[p] *L.* 29, *D. de condit. et dem.*; — *l.* 218, *D. de verb. sign.*

[q] *L.* 7, *D. de cond et dem.*; — *v. Nov.* 22, *c.* 44. See the forty-sixth article.

[r] *Ll.* 2 *et* 10, § 1, *D. de condit. et dem.*

XXVII.

3241. *Conditions which depend on the Act of Third Persons.* — We must reckon in the number of conditions which depend on events wherein the act of the heir or executor, or legatee, has no share, those which depend upon the act of third persons; as if a testator had left a legacy or a sum of money to be laid out according to his intention, in case the same should be approved by a person whom he should name, such as the executor of his testament, or other person, leaving it to the said person to execute or not to execute his intention, which he had explained to him; as, for example, if it was for making a restitution, which the testator was in doubt whether he was obliged to make or not, and the decision of which doubt he was willing should depend on the said person.[s]

XXVIII.

3242. *Conditions which depend on the Combinations of Acts and of Events.* — The conditions which depend partly on the act of the executor or legatee, and partly on some event, whether it be the act of third persons, or a casualty, have their effect differently, or have it not, according to the nature of the conditions and the circumstances, by the rules which follow.[t]

XXIX.

3243. *Examples of Conditions which depend partly on the Act of him who is charged with them, and partly on the Act of other Persons.* — If the executor or legatee were charged with a condition which did not solely depend on his act, but which should depend also on the act of another person, whom the disposition of the testator might concern, and who should refuse to do what was necessary to be done on his part towards accomplishing the condition, it would be sufficient, if the executor or legatee did, on his part, all that depended on him. Thus, for example, if the condition were to give a sum of money to a person, or to build something in a public place, or for the use of a particular person, and those whom the said disposition did concern would not accept of the sum of money, nor suffer the work to be done, it would be the same thing as if the condition were accomplished.[u]

[s] *L.* 1, *D. de legat.* 2. See the thirty-first article.

[t] See the following articles.

[u] *L.* 3, *D. de condit. inst.*; — *l.* 24, *D. de cond. et dem.*; — *l.* 81, § 1, *eod.*; — *l.* 5, § 5, *D. quand. dies leg. ced.*; — *l.* 14, *D. de cond. et dem.* See the following article.

XXX.

3244. *Another Example of the Same.* — If the condition should depend partly on the act of him on whom it is imposed, and partly on the act of another person, without whom the said condition could not have its literal accomplishment, but it should be possible to supply in another manner that which the intention of the testator might seem to demand of the executor or legatee who is charged with the condition, he might satisfy it by accomplishing the said intention in the manner that were possible. Thus, for example, if an executor or legatee were charged to buy a house, or other tenement, for some person to whom the testator had a mind to give it, and the proprietor would not sell the said house or tenement, or would not sell it but for an extravagant price; the executor or legatee would satisfy the condition by paying down the just value of the said house or tenement to the person to whom the testator had a mind to give it.[x]

XXXI.

3245. *If the Condition depends entirely on the Act of a Third Person.* — If the condition were entirely dependent on the third person, as in the case of the twenty-seventh article, the disposition of the testament would have its effect, such as should be regulated by the said third person, according to the power given him in that matter by the testator.[y]

XXXII.

3246. *Example of a Condition which, although depending on the Act of other Persons, must be accomplished.* — It is not always enough that an executor or a legatee do all that is in his power towards accomplishing a condition which depends partly on his act, and partly on the act of other persons; for there are conditions which are of such a nature, that no sort of obstacle can dispense with them, and which must necessarily be accomplished in order to give effect to the dispositions which depend on them. Thus, for instance, if a testator had instituted a foreigner his executor, or given him a legacy, on condition that he should be naturalized at the time of the death of the testator, and that, having used his endeavours, he could not obtain his naturalization in time, this institution and this legacy would be without effect, because

[x] *L.* 8, § 2, *in f. D. de condit. inst.*; — *l.* 14, § 2, *D. de legat.* 3.

[y] This is a consequence of the twenty-seventh article.

the said executor, or the said legatee, would remain still under the incapacity which the said condition was to have removed, and which could not be removed in any other way.[z]

XXXIII.

3247. *Another Example.* — We see by the example explained in the preceding article a case where the incapacity of the legatee is joined with the non-performance of the condition; but there may be cases where, without the incapacity of the legatee, the legacy would be null, although it should be noways his fault that a condition which depended on his act, and on that of the other persons, were not accomplished. Thus, for example, if a testator having left a sum of money to one of his friends, on condition that he should accept and exercise the tuition of his children, and that, in case he did not exercise it, the legacy should be reduced to a lesser sum, or be wholly null, it had happened that the legatee being willing to accept and exercise the tuition, it was judged to be for the benefit of the minors that another tutor should be assigned them, and accordingly another was actually named; the condition not being fulfilled, the legacy would be either wholly null, or diminished according to the disposition of the testator And although the condition depended, not only on the act of the legatee, but also on the act of other persons, and it was not the fault of the legatee that it was not executed, yet his good will would not be enough to satisfy the condition. For besides that the relations and the judge, who were the other persons whose act was necessary for accomplishing the condition, had no interest whether the legacy should subsist or not, this legacy was given out of a motive of recompensing a good office, and upon condition that the same should be effectually performed.[a]

[z] *L.* 62, *D. de hæred. instit.*

[a] Conditionum verba, quæ testamento præscribuntur, pro voluntate considerantur. Et ideo, cum tutores testamento dati, quoniam interea puer adoleverat, id egerit, ut curatores ipsi constituerentur, conditio fideicommissi talis præscripta, si tutelam in annum octavum decimum gesserint, defecisse non videbitur. *L.* 101, § 2, *D. de cond. et dem.* See the tenth article.

In order to understand this text, it is necessary to remark, that by the Roman law, as has been said in the preamble of the title of *Tutors*, the tuition ended when the pupil arrived at the age of puberty, which was fourteen years in males, and twelve in females; and during the rest of the minority, to the age of five-and-twenty years complete, curators were assigned them. So that in the case of this text, the legatees having exercised the tuition to the age of fourteen years, and the curatorship to the age of eighteen years, the question was to know if, the testator having put down for a condition that the legatees

XXXIV.

3248. *A Rule for Conditions which depend partly on the Act of those to whom they are enjoined, and partly on the Act of others.* — It follows from the rules explained in the foregoing articles, that in the cases where testators charge their executors or legatees with conditions which depend partly on their own act, and partly on the act of other persons, it cannot be laid down as a fixed and general rule, either that those bequests are all null if the condition is not effectually accomplished, or that they all have their effect, and are held to be accomplished, if it is not the fault of the executor or legatee that the condition is not fulfilled: for there are some cases where the conditions are held to be accomplished, although they be not so in effect, provided that the person who was to satisfy the condition has done all that was in his power towards it; and there are others where it is absolutely necessary that the conditions be accomplished. But the only general rule, and which is common to all these sorts of conditions, is, that we must judge of them by their nature, by the quality of the acts on which they depend, by the interests of the persons whom the testator has considered, by the motive which he had in his view; that we must distinguish among the motives, those where it appears that the testators have absolutely intended that the condition should be accomplished, as in the case of the preceding article, from those where it may be reasonably presumed that the testators have required only the act of the person on whom the condition was imposed, as in the case of the twenty-ninth article. And it is by all these views, and others which may help to discover the intention of the testator, that we are to judge of conditions, giving them such an effect as the intention of the testator may seem to demand.[b]

XXXV.

3249. *A Rule whereby to distinguish Conditional Dispositions from those which are not so.* — It is not enough, as to what con-

should act as tutors till the pupil should attain the age of eighteen years, they had satisfied the condition, having been tutors only to the age of fourteen, and curators to the age of eighteen years. But the intention of the testator being that they should take care of all the concerns of the children till they should be full eighteen years old, the condition is fulfilled, although the expression be not in the literal sense. Seeing the case of this text does not agree with our usage, where the tutorship lasts to the age of twenty-five years complete, we have put another case to serve for the rule explained in this article. This rule results from this text by the reason of contraries.

[b] This is a consequence of the preceding rules.

cerns conditions, to discern between those which depend on the act of the persons on whom they are imposed, and those which may depend on something else, and to make the other distinctions of conditions explained in the fifteenth, sixteenth, and other following articles; but it is necessary likewise to distinguish, among the several sorts of dispositions which contain charges, destinations, motives, descriptions, and terms of time, those which are conceived in the nature of conditions, and which have the effect thereof, from those which do not make conditions, according to the rules and examples which have been explained in the seventh, eighth, and other following articles. Thus, for another example, in the case of a motive and a destination specified in the testament, if a testator had bequeathed a rent, a pension, or some usufruct to one of his friends for his maintenance, this motive explained after this manner would not make a condition which would give the executor a right to require some security from the legatee that he should employ the said legacy on his maintenance, or to oblige him to account to him for it. For although this disposition implies, with respect to the legatee, the intention of the testator that this legacy should serve for that use, yet this motive, respecting only the person of the legatee, would leave to his management the use of the legacy, unless the testator had directed some precaution independent on the will of the legatee, and that for particular reasons, such as the poverty of the legatee and his want of conduct. Thus, on the contrary, if a testator had left to a young woman a sum of money for her portion when she should marry, this motive, this destination, and this time marked by the testator would make the legacy conditional; and if the said young woman should die before she married, it would remain null.[c]

XXXVI.

3250. *It is necessary to consider in Dispositions whether they contain Conditions, and what is the Effect of them.* — There are two things to be considered in the dispositions of testators as to conditions: one is, to know whether the disposition be conditional or not, which depends on the preceding rules; and the second is, to know what ought to be the effect of the condition when the dis position is conditional, which depends on the relation which the conditions have to the events. And seeing the differences of events are infinite, and that the examples of some facilitate in all the rest

[c] See the other articles cited in this.

the use of the rules, and are even given in the laws for rules, we shall perceive more and more this use in the examples and rules which follow.[d]

XXXVII.

3251. *The Condition which ought to distinguish Two Heirs or Executors not happening, they succeed equally.* — If a testator had instituted his two brothers his heirs or executors, on condition that whichsoever of the two should purchase such an office he should have two thirds of the estate, and the other a third, and one of the two should accomplish the condition, he would have the two thirds; but if neither of the two should buy the office, whether it were that they were not able or not willing to do it, they would share the estate equally between them. For both the one and the other were called to the succession, and they ought not to be distinguished except by the condition if it should so happen.[e]

XXXVIII.

3252. *A Condition may chance to be accomplished in the Testator's Lifetime.* — The greater part of conditions ought to be accomplished only after the death of the testator, and in obedience to his will; but there may be some conditions which happen to be accomplished in the testator's lifetime without this view, and which have nevertheless their effect.[f] Thus, for instance, if a legacy of a sum of money is left on condition that the legatee buy such an office, or marry the testator's daughter, and he have bought the said office or married the daughter before the testator's death, he shall have the legacy: for in these sorts of conditions it is equal for the effect of the disposition of the testator whether they come to pass before or after his death; and it is sufficient that his will be found to be performed in the manner that it ought to be, if the condition be such as that it ought to be fulfilled only once for all.[g] But if it can be reiterated, it must be satisfied in the manner which shall be explained in the following article.

XXXIX.

3253. *If this Condition is an Act that may be reiterated, it must be accomplished.* — If, in the case of the foregoing article, the condi-

[d] See the following articles.
[e] *L.* 23, *D. de condit. inst.*; — *l.* 24, *eod.*
[f] *L.* 11, § 1, *D. de condit. et dem.*; — *l.* 2, *eod.*
[g] *L.* 10, *eod.*

tion did depend on an act which might be reiterated; as if it was to give a sum of money to a hospital, and he who was charged with the condition had already given the like sum to the same hospital before he knew any thing of the testament, he would nevertheless be bound to give such another sum to fulfil the condition, especially if the testator knew of the gift which the legatee had already made; for this liberality may be reiterated.[h] And the gift which he had made of his own accord, not being an effect of the disposition of this testator, who intended that this gift should proceed from his bounty, was, with regard to the intention of this testator, only a chance, which, not satisfying his intention, did not accomplish the condition.[i]

XL.

3254. *If there be a Term joined to the Condition, it is necessary to wait till the Term.* — If a testator requires his executor or a legatee to give a sum of money to some person, in case that within a certain time the said executor or legatee have no child, or upon some other condition, and the said executor or legatee happens to die without children, or the other condition chances to be accomplished, before the time specified, the legacy will not be payable till the term be expired. For although it be already certain by the event that the legacy is due, seeing the condition is come to pass, yet the expression of the testator implies the term of payment to be after the said time shall be expired.[1]

XLI.

3255. *Conditions do not admit of a Division.* — Conditions do not admit of a division, so as that an executor or a legatee may pretend to content himself with a part of what is given him, he performing only a part of the condition that is enjoined him; but he can have nothing at all unless he accomplishes the whole condition. Thus, for example, if a tenement is devised on condition that the legatee pay a sum of money to every one of the executors, or to other persons, or that he acquit some debts of the succession which shall be specified to him, he cannot divide the legacy by dividing the condition, in order to have part of the legacy in proportion to what part of the debts he has been able or willing

[h] *L.* 11, *D. de condit. et dem.*
[i] *L.* 2, *in f. D. eod.*
[1] *L.* 4, § 1, *D. de condit. et demit.*

to acquit; but he ought to pay and acquit the whole, unless he will renounce the legacy.[m]

XLII.

3256. *The Condition imposed upon several Persons may be divided among them.* — If one only condition which is imposed on two legatees be such as that it may be divided, as if a testator devises a land or tenement to two of his friends, on condition that they acquit a certain sum of money, they divide the condition between them, and pay each his share of the sum, in order to share the legacy between them. And if one of them alone, upon the other's refusal, acquits the whole sum, he shall have the whole legacy. Or if there be only one of them who acquits his proportion, and the other fails to acquit his, he shall have a part of the legacy proportionably to what he shall have acquitted, if the will of the testator can bear that the condition and the legacy be divided. But if the condition is indivisible, as if the legacy was given on condition that the legatees should do some work, the legacy cannot be divided so as to give a share of it to one of the legatees in proportion to what he should pretend to do of the work; but the legacy would either be divided between them, if both of them together had fulfilled the condition, or given entirely to one of them who should fulfil it.[n]

XLIII.

3257. *A Legacy for a Work is to be regulated according to the Estate of the Testator.* — If a testator had charged his executor or a legatee to build some edifice, whether it were for public convenience or ornament, or for some pious use, such as a church for a parish, or an apartment in some hospital, and had regulated the sum for defraying the charges thereof, the executor would be bound to pay what had been regulated by the testator. But if he had not declared the sum, nor specified the manner in which the edifice was to be built, the same would be regulated according to the estate and quality of the testator, and the use for which the said building was designed.[o]

[m] *L.* 56, *D. de condit. et dem.*; — *l.* 23, *eod.*
[n] *L.* 56, *D. de condit. et dem.*; — *l.* 112, § 2, *eod.*; — *l.* 6, *C. de condit. inf. tam leg. q. fid.*
[o] *L.* 27, *D. de condit. et dem.*

XLIV.

3258. *The Condition, "If the Testator should die without Children," is fulfilled if the Father and Son die at the same Time.* — If a legacy or a fiduciary bequest is left to a person in case the executor or legatee who is burdened with it should die without children, and it happens that the said executor or legatee, having only one child, perishes with him either in a battle or in a shipwreck, or by some other accident, so that it is impossible to know whether both the one and the other die in the same instant, or if one of them survive the other, and which of the two; the intention of the testator being that the fiduciary legatee should be preferred to all others, except a child of the executor's or legatee's, and there remaining no child who has right to exclude him, the case of the fiduciary bequest would be come to pass.[p]

XLV.

3259. *The Dispensation of Age does not accomplish the Condition of Majority.* — If the disposition of a testator, whether it were the institution of an executor or other disposition, should contain the condition of majority in the executor or legatee, this condition would not be accomplished any other way than by the age of majority. And the dispensation of age, which might be obtained by the person whom the testator required to be of full age, would not satisfy the condition.[q]

XLVI.

3260. *Divers Ways of Providing for the Execution of Conditions, and other Dispositions.* — The conditional dispositions of testators, and others which may oblige the executor or legatee to some security or precaution, are executed according as the intention of the testator and the circumstances may seem to demand. And provision is made in this matter different ways, either according to what the testator himself has ordained, if he has explained himself about it, or in the manner which may best suit with the interest of the persons who may be concerned in the said bequests.[r]

[p] *L.* 17, § 7, *D. ad senat. Trebell.* See the seventh article of the second section of *Pupillary Substitution*, and the eighteenth article of the section of *Direct Substitutions*. See the eleventh and twelfth articles of the second section, *In what manner Children succeed*, and the remarks which are there made.

[q] *L ult. C. de his qui ven. æt. imp.*

[r] *L.* 12, *D. qui satisd. cod. cog.*; —*l.* 13, *eod.* The word *cavere* in these texts does not

Thus, a testator may, for the greater security of his legacies, and of the other charges with which he burdens his succession, name an executor of his testament, who shall take possession of all his goods, in order to acquit the legacies and the debts, and to restore to the heir the goods which may remain after payment of the debts and legacies, as shall be explained in the eleventh section. Thus, the heir or executor of a testament may retain the fund of a legacy of a sum of money which is destined for some use, until it be applied to the said use. Thus, in a legacy left on condition that the legatee shall remit to one of his debtors the debt which he owes him, the heir or executor may oblige him, upon delivering the legacy, to give up the said debtor's bond, or to give an acquittance of the debt if he had no bond for it. Thus, a legacy of a rent to be paid out of a certain land or tenement would have its security upon the said land or tenement, and upon the other goods of the succession, and of the heir or executor. Thus, in the different charges and conditions, whether it be to give, to do, or not to do, it is by the circumstances that we ought to regulate what ought to depend solely on the faith and integrity of the executor or legatee, and what may demand some other kind of security.[s] Thus, in general, the legatees, as well as creditors, who may have ground to fear that the executor is not in good circumstances, and that he may misapply the effects of the succession, may secure them by having them sealed up by order of the judge, unless the executor gives them satisfaction, either by finding sureties or by other ways.[t]

XLVII.

3261. *A Legacy which is given on Condition that the Executor does approve thereof is not Conditional.* — We must not reckon in the number of conditional bequests a legacy which the testator has bequeathed in terms that seem to demand the approbation or consent of his executor. As if he had bequeathed a sum of money, if his executor should think well of it, or should judge it to be just and reasonable, or had added some other such like expression, even although he had left the legacy on condition that his executor should be pleased with it. For these terms would not

signify the giving of surety, but only to oblige himself, or to promise, or to make, as it is called, his submission.

[s] *L.* 7, *d. l.* § 1, *D. de condit. et dem.*; — *l.* 18, *eod.*; — *v. Nov.* 22, *c.* 44.

[t] *L.* 1, *D. ut legat. seu fideicom. serv. caus. cav.*; — *d. l.* § 2.

make the legacy to depend on the will of the said executor, but they would show only that the testator had considered his executor as a reasonable person, whom he was willing to engage by this civility to execute his intention with pleasure and cheerfulness.[u]

SECTION IX.

OF THE RIGHT OF ACCRETION.

3262. *The Right of Accretion in Legal Successions.* — The right of accretion is the right which each of two heirs to the same succession, or of two legatees of the same thing, has to take the share or portion of the other, who either cannot or will not take it himself. In order to understand well what this right is, it is necessary to consider it in a case where we may easily discover what its nature is, and what its origin. If we suppose that, a father leaving behind him two children, there is one of them who renounces the succession, or renders himself unworthy of it, or is incapable of it by reason of some condemnation or otherwise, or who is justly disinherited; his share or portion, which he either could not or would not take, remaining in the mass of the inheritance, it will belong entirely to his brother, who will be the only person left to succeed as heir. And it would be the same thing in collateral successions of brothers, or other more remote relations, if, two or more coheirs being called together to the same succession, one of them either would not or could not take his part therein.

3263. This right of the heir, who acquires the portions of the others, is called accretion, because the portion of the person who does not succeed accrues to him who succeeds alone, so that he has the whole. We see, in these cases of legal successions, that this right of accretion is altogether natural in them, being founded on this, that the law which calls the heirs of blood to successions calls them thereto according to their number, and in such a manner that, if they are two or more in number, they share among them the inheritance by equal portions; and if there be only one, he alone has the whole. For it follows from this rule, that it is only the concurrence of several coheirs together which divides the succession among them, and that therefore, as any one of them

[u] *L. 75, D. de legat.* 1.

ceases to take his share or portion, it remains in the inheritance, and is acquired to the others by virtue of the right which they have to the whole, which will remain entire to one alone if there be no more heirs than one.

3264. *The Right of Accretion in Testamentary Successions.*— As to testamentary successions, it may be said that the right of accretion is not so evidently just and natural in them as it is in the legal successions. For if, in the case of two testamentary heirs, who are not heirs of blood, one of them not being willing or capable to succeed, it should be necessary to decide to whom his share or portion should belong, whether to the testamentary coheir, or to the heir of blood; the right of this testamentary heir would not be so perfectly evident against the heir of blood as is, in the case of a succession to an intestate, the right of the heir of blood, who is found to be sole heir by the default of his coheir, who cannot or will not take any share or part in the inheritance. For in this second case, the right of this heir of blood cannot be controverted by any person whatsoever; and in the first case of the testamentary coheirs, the heir of blood would have strong reasons to urge against the testamentary heir who should claim the share or portion of the other; as shall be remarked hereafter.

3265. This question is decided by the Roman law in favor of the testamentary heirs. And seeing the right of accretion is natural to the heirs at law, and that the quality of heir, which is common to the testamentary heir and to the heir at law, makes the heir universal successor to all the goods of the deceased, the Roman law has regulated that, the testator having had a mind to exclude his heirs at law, or next of kin, from his succession, and to dispose of it by will, the testamentary heirs were the only persons called to the whole inheritance; and that therefore he who was instituted heir only for a part became heir to the whole, if the heir to the other part would not or could not accept it. It was probably upon this principle, which makes the quality of heir to give a universal right, by which the whole inheritance is acquired to him among the heirs who proves to be the only one who is willing or capable to accept of it, that this other rule of the Roman law was founded, to wit, that a succession cannot be regulated partly by testament, and partly without it;[a] so as that a testator should be able to dispose by testament only of one part of his estate, insti-

[a] *L. 7, D. de reg. jur.*; — § 5, *Inst. de hæred. inst.*

tuting, for example, an heir or executor for one half of it, without disposing also of the other half. For in this case the heir or executor who was instituted for one half was heir to the whole, and excluded from the other half the heir at law, or next of kin, who was not called by the testament. And even although the heir named by the testament had been instituted heir only in a certain land or tenement, which is properly speaking no more than a legacy, yet the quality of heir being given him, he was universal heir to all the goods of the succession.[b]

3266. It results from this first remark on the right of accretion among heirs at law, and on that which takes place among testamentary heirs, that there is this difference between these two sorts of accretion, that it may be said of that among heirs at law, that it is of the same natural right as the law which gives them the succession. For as it is naturally just and equitable that, if two heirs of blood be equally called by their proximity, they ought to share the succession between them, so the same equity demands that the inheritance should remain entire to him who proves to be sole heir by the exclusion of others. But it may be said of the accretion in testamentary successions, that it derives its force more from the positive law than the law of nature. For if, in the case of a testament which calls to the inheritance other heirs than those who are the heirs of blood, the law had ordained that there should be no right of accretion among them, unless the testator had expressly ordered it to be so, but that the share or portion of him who would not or could not be heir should go to the heir at law, together with the charges of the testament, and that so there should be two heirs, one by testament and the other by law, it could not be said of such a law that it was contrary to the law of nature. And it might even be alleged in favor of the heir at law, that it would be natural enough, seeing the testator intended to give to each of the heirs named by his testament only a portion of the inheritance, that each of them should be reduced to his portion; and that the share of the testamentary heir who either could not or would not succeed should be left to the heir at law, in the same manner as he would have the whole if none of the testamentary heirs did succeed. And the right of the heir at law to the vacant portion would be with much more reason just

[b] *V. l.* 41, *in fin. D. de vulg. et pup. subst.*; — *l.* 2, § 2, *D. de bon. poss. sec. tab.*; — § 5, *Inst. de hæred. instit.*

and natural, if the testator had instituted one only heir for a moiety or other portion of the inheritance, or even only for one single tenement; seeing in these cases proposed in the Roman law, as has been already observed, the presumption would be natural enough, that the testator had a mind that the rest of his goods should go to his heir at law. And although it would happen by the law which in these cases should call the heir at law to succeed with the heir by testament, that he to whom the testator had given the title of heir would not be universal heir, and that the succession would be regulated partly by testament, and partly as of one dead intestate; yet there would be nothing in these two events contrary to the law of nature, and which an arbitrary law could not ordain. For as to the first, although the testamentary heir who should remain the only one of the two instituted by the testator would not be universal heir, and the heir at law would share the inheritance with him, it would nevertheless be always true that the title of heir would be universal, but divided between two heirs, as it happens as often as there are more heirs than one, whether they be heirs by testament, or heirs at law. And as to the second, although one part of the succession would belong to the testamentary heir, and the other to the heir at law, the testament having its effect only for one of the heirs whom the testator had named in it, yet this event would do nothing else but give to two different laws the natural effect both of the one and of the other: for it would give to the law of nature the effect of making the heir of blood to inherit, and to the law which permits the making of an heir by a testament the effect of giving to the testamentary heir, who should be found capable of succeeding, the portion of the inheritance which the testator had a mind to give him. Thus, the intention of the testator being accomplished, the law which permits the use of testaments would be so likewise. To which we may add, that it is so far from being contrary to the law of nature for a testamentary heir to share the inheritance with the heir at law, and for one to succeed by testament, and the other by the bare effect of consanguinity, that in our customs there can be no institution of an heir, who is called universal legatee, where we do not see the succession regulated partly by law, as of one dead intestate, and partly by testament; since the universal legatee succeeds by the testament, and the heir at law succeeds by the law, and that even against the testament. Which does not hinder both the one and the other from having a universal title, as two coheirs

have, whether they succeed as next of kin to an intestate or by testament, who divide the succession between them. And we see likewise in the Roman law, that not only divers sorts of goods go to divers sorts of heirs,[c] as well as by our customs, but that he who had a right to make a military testament had power to leave his succession partly regulated by testament, and partly by the disposition of the law as dying intestate.[d] And it is known that several interpreters have been of opinion, that in divers cases every testator, although he had not the privilege of making a military testament, left part of his succession to be disposed of by law, while he disposed of the other part by testament. And even in the cases where the right of accretion was to take place by the Roman law, it might happen that the succession might be divided, and go part of it to one of the heirs by testament, and part of it to the exchequer, when by the fiscal laws the exchequer seized on the share or portion of the heir who could not succeed, and excluded the coheir from it, who, had it not been for the said fiscal laws, would have had the right of accretion.[e] So that we may reasonably conclude that which has been already advanced to be now sufficiently proved, that whereas the right of accretion in legal successions is a part of the law of nature, in testamentary successions it derives its force only from a positive law.[f]

3267. The right of accretion which hath been mentioned hitherto respects only coheirs; but it was extended to legatees, to whom one and the same thing is bequeathed in terms which ought to have that effect: for this right doth not always take place among legatees of the same thing, as it does among coheirs of the same succession. But according to the different expressions made use of by the testators, there might or there might not be a right of accretion among the legatees, which depends on the rules that shall be explained hereafter.

3268. *Causes of the Difficulties in the Matter of the Right of Accretion.* — It may be remarked, as a consequence of the reflections which have been just now made on this right of accretion, which takes place among testamentary heirs as well as

[c] See the second section of the second title of the second book.

[d] *L.* 6, *D. de test. mil.*; — *l.* 2, *Cod. eod.*

[e] *Ulp. tit.* 24, § 12.

[f] See, concerning all that has been said for the heir at law, the remark on the sixth article.

legatees, that whereas this accretion derives its force only from the positive law, and in legal successions it may be said to be a part of the law of nature; this is an effect of that difference between these two sorts of accretion, that as for that accretion which naturally belongs to the heirs at law, there does not seem to arise any difficulties from it; whereas there occur many difficulties in the accretion which takes place in testamentary dispositions, as we see by experience in the Roman law. For although mention be made there of the right of accretion in legal successions,[s] yet we find no difficulties or questions started concerning the right of accretion, except in testamentary successions; which proceeds from hence, because the right of accretion in legal successions being a necessary consequence of a principle that is simple and natural, which is the right that the law gives to the heir of blood to have the whole succession, when he happens to be the only heir; there is nothing more easy than to know whether this right takes place. But, on the contrary, the right of accretion in the dispositions of testators depends on two principles which are arbitrary, and subject to different interpretations. One is the will of testators, whose dispositions may either give occasion to the right of accretion or prevent the same. And the other is the law prescribed by divers rules, which the Roman law hath established concerning this matter. So that as it may be said, that these rules are not there explained with that order and clearness that is necessary for understanding them aright, so that one may be able to judge thereof by their connection, and that the dispositions of testators, which are oftentimes conceived in obscure terms, and the different combinations of the circumstances which arise from the events, make it oftentimes very uncertain how to find out the true will of the testators, as well as how to apply the rules which may relate thereto; this matter of the right of accretion has been rendered so intricate, that some interpreters have said, that there is not one matter in the law of so great difficulty as this is; although it be likewise true, that there is no matter in the law of which the use is less necessary; since we might have been very well without the rules of the right of accretion, if it had been limited to legal successions, and to the cases where the testator should appoint it to take place. A law of this simplicity and easiness would have prevented the trouble of a great many rules, and a great many lawsuits, and would have

[s] *L.* 9, *D. de suis et legit. hæred.*

been attended with no manner of inconvenience. For where would be the inconvenience, if the share or portion which one of the testamentary heirs could not or would not take should remain to the heir at law, the other testamentary heir having what the testator left him; or if that which one of the legatees refused, or could not take, should go to the heir, the other legatee contenting himself with the share or portion left him by the testament; or, in fine, if a testamentary heir, who should be instituted alone, and only for a share or portion of the inheritance, according to the examples which we see of such like institutions in the Roman law, or for some one land or tenement in particular, were reduced to that which the testator had left him? It would seem that, if any law had regulated things in this manner, either it would not be said that these events are inconveniences, or if they should be thought so, yet they would still appear less than that of the difficulties which arise from the law concerning the right of accretion, in the manner that we find it regulated by the Roman law.

3269. We have made here all these remarks on the right of accretion, in order to give an idea of its origin, of its nature, and of the general principles relating to this matter. And we have thought proper to add here occasionally the reflections which have been made for distinguishing, in the matter of accretion, that which is of the law of nature from that which it has from the positive law, established by pure arbitrary laws, and which might have been otherwise regulated. We have made these reflections, as also those which shall hereafter be explained, only with a view to unravel the difficulties of this matter which the interpreters own to be so great in the Roman law. For to understand rightly any matter whatsoever, and the difficulties which may arise in it, it is necessary, or at least useful, to distinguish exactly, in the common ideas which are given us of it, between that which is essential to its nature and that which is not. And although, this view having engaged us in an inquiry into the principles of the Roman law, which have been the foundation of the right of accretion in testamentary successions, we have been obliged to remark on the nature of these principles, that the law of accretion could have been very well spared, except in successions of intestates, and in the cases where the testators had particularly directed it to take place in their dispositions; yet we did not pretend to leave out of this book the rules of the Roman law relating to this matter; since, on the contrary, they compose this section, and are even presupposed as the founda-

tion of the remarks which are still to be made. But we thought ourselves at liberty to make these reflections, and that even those who should not approve of them would not, however, condemn the liberty of proposing them as bare speculations, without requiring any person's approbation of them.

3270. After these general remarks on the right of accretion, it remains only that we add some other particular observations on the detail of this matter, and which are necessary for clearing up the difficulties in it. Seeing the right of accretion in legal successions hath its foundation in this, that the coheirs are joined together by the tie which is made between them by the succession that is common to them; the right of the heir who is called to inherit the shares or portions which become vacant is in effect a simple and natural right to take the whole, because none of the other heirs take any part of it from him. So that one may as well say, and with as much or more reason, that he has the whole because his right to the whole suffers no diminution by the concurrence of other heirs, as to say, that he has the whole by the accretion of the portions of the others. It is in imitation of this right of the heirs at law, that the Roman law hath given to testamentary heirs the right of accretion, as has been already explained; so that the foundation of their right of accretion is their union with one another, because of the quality of coheirs or coexecutors of a succession that is common to them; which is the reason why they are said to be conjoined, that is, jointly called to the inheritance; as it is also said of two or more legatees of one and the same thing, that they are jointly called to the legacy that is common to them. And seeing testators, who institute several executors, or who give to several legatees one and the same thing, may express themselves in different manners, and may join them together by divers expressions, which may have different effects; the Roman law has distinguished three manners in which executors and legatees of one and the same thing may be linked or joined together in a testament.[h]

3271. The first is that which joins them by the thing itself that is devised to them, although they be not joined by one common expression;[i] as if a testator institutes, in the first place, one executor, and then institutes a second by another clause, without distinguishing their shares or portions; or if he gives a house to

[h] *L.* 142, *D. de verb: signif.*

[i] *L.* 89, *D. de legat.* 3.

a legatee, and gives afterwards and separately the same house to another legatee by another clause. We make choice of this example, because, although this manner of devising may seem to be whimsical to us, and to be very improper for a testator who has any sense, or who is used to be anyways exact in his affairs, yet the examples of it are frequent in the Roman law.

3272. The second manner is that which joins together the executors or legatees both by the thing and by the expression of the testator;[l] as if he institutes such a one and such a one his executors; or if he gives to such a one and such a one a house or some land.

3273. The third is that which joins the persons together only by word, and not by the thing; as if a testator devises a land or tenement to such a one and such a one by equal portions.[m]

3274. We express here these three manners of devising, just as they are explained in the laws which make mention of them; but we must not take this distinction of the manners in which a testator may join together executors or legatees of one and the same thing to be a division of a geometrical or metaphysical exactness, so as that it may agree equally to executors and to legatees, and as if each of these manners had always the same effect indifferently for legatees as for executors in what concerns the right of accretion. We should be often mistaken, if we always understood it so; and we should find even that an expression, which in some laws is given for an example of one of these manners, is given elsewhere for an example of another. Thus, it is said in one law, that this expression, *I institute such and such a one my heirs, each of them for a half*, makes a conjunction both by the thing and by word.[n] And in another law this expression, *I give and bequeath to such and to such a one such a land or tenement, by equal portions*, makes only a conjunction by words, and not by the thing.[o]

3275. We see that these two expressions are exactly like to one another; for to institute or bequeath by moiety, or by equal portions, is the same thing: and yet, nevertheless, they are given for an example of two sorts of conjunction wholly different from one another, and so vastly different, that in one there is a right of accretion, and not in the other; but the laws in which these instances

[l] *L.* 142, *D. de verb. signif.*; — *l.* 89, *D. de legat.* 3.
[m] *D. l.* 89, *D. de legat.* 3.
[n] *L.* 142, *D. de verb. signif.*
[o] *L.* 89, *D. de legat.* 3.

are given do not mark in what manner we ought to reconcile this apparent contrariety, which proceeds from the difference between legacies and an inheritance. This difference consists in that which hath been already remarked, that as to what concerns an inheritance or succession, in what manner soever one institutes two heirs or successors, whether by one and the same clause, or separately; whether one expresses their shares or portions, or makes no mention of them; yet nevertheless they are joined together by the thing, that is, the inheritance, which one considers as indivisible, and there is always between them a right of accretion, for the reasons which have been explained: and it is for these reasons that, with regard to an inheritance, this expression, *I institute such and such a one my heirs, each for a half*, makes a conjunction or union by the thing. But as for legacies, if a thing is bequeathed to two persons by portions, whether equal or unequal, seeing the thing bequeathed may be divided either by its parts, if it is divisible, or by its estimation, if it is indivisible; this expression, *I give and devise to such and to such a one such a land or tenement, by equal portions*, makes no conjunction by the thing. Thus each legatee hath his right limited to his share or portion; and if one of the legatees either cannot or will not take his portion, it will not be therefore vacant, and without an owner, but the heir will have the benefit of it, and the other legatee will have all that the testator had a mind to give him, that is, the portion which he left him.

3276. It is according to this distinction that we must understand the divers effects of these expressions, which are perfectly like to one another, and which perplex the reader, if they are not taken differently every one in its proper sense. But this is not the only difficulty that we find necessary to be cleared up in this matter; for we meet with other difficulties in other laws. Thus, for example, it is said in some laws, that, when two legatees are joined together, the thing is given entire to every one of them, and that it is divided only when they concur and meet together; and that therefore there is between them a right of accretion. *Conjunctim hæredes institui, aut conjunctim legari, hoc est, totam hæreditatem, et tota legata singulis data esse, partes autem concursu fieri.* *L.* 80, *D. de legat.* 3. And we see in other laws, that if the legatees of one and the same thing are disjoined, they have each of them the whole, so that if they concur, they share the legacy between them: and if one of the two does not take his part, it accrues to the other. *Si disjunctorum aliqui deficiant, cæteri totum habebunt.* *L.*

un. § 11, *Cod. de cad. toll.*; — *l.* 33, *D. de leg.* 1. It would seem to follow from these two texts, that, the conjunction and disjunction having equally the effect to give the right of accretion to the legatees, they will always have it, in what manner soever they be legatees of one and the same thing; which does not hold true of those to whom the legacy divides the thing; for between them there is no accretion. So that, to reconcile these several rules, it is necessary to understand, in the first of these two texts, the word *conjoined* of legatees who are conjoined by the thing; as if a testator bequeaths one and the same thing to two persons, without distinction of portions: and in the second, we must understand the word *disjoined* of those who are disjoined only by the words, and who are conjoined by the thing; as if a testator, having bequeathed a thing to a legatee, bequeaths the same thing to another person by another clause, as it has been already remarked.

3277. We shall not enlarge here on the detail of the other particular difficulties which we meet with in the laws concerning this matter; for such a particular inquiry would only perplex the reader to no purpose: as, for example, the differences which the ancient Roman law made in the right of accretion, between a legacy which was called *per damnationem*, by which the heir was required to give a thing to a legatee, and the legacy which they called *per vindicationem*, by which the thing was given to the legatee, so as that he himself might take it out of the inheritance; as if the testator had said, I will that such a one take such a thing.[p] According to these divers manners of bequeathing one and the same thing to two legatees, the right of accretion might take place, or not take place, between them.[q] And it suffices to remark in general on all the difficulties of this matter, that they remain such both in the ancient and modern law of the Romans; that even the laws which explain the principles and general rules thereof contain expressions which the interpreters explain by senses quite opposite to one another, to which the said expressions give just occasion, as appears by some of the texts which have been taken notice of in this preamble, and by others, in which they have suffered the ancient difference between these two sorts of legacies, which have been just now mentioned, to subsist, although it had been abolished by Justinian. Which is one of the causes of the difficulties in this matter; and it has given occasion to one of the ablest of

[p] § 2, *Inst. de leg.*; — *Ulpian. tit.* 24, §§ 3 *et* 4. [q] *Ulpian. tit.* 24, §§ 12 *et* 13.

the interpreters to charge those with stupidity or negligence, who were employed to collect out of the books of the ancient lawyers the extracts which compose the Digest, for not having taken due care to keep out of the said extracts that which was abolished of the ancient law, and for having by that means left in several places texts contrary to others which they have inserted.[r]

3278. One may judge by all these reflections, that the difficulties which arise in this matter of the right of accretion are almost of the same nature with those of codicillary clauses in testaments. But there is this difference between these two matters, that, as for codicillary clauses, there are no rules certain enough in the Roman law, from which we could gather a fixed and stated law in relation to them, as has been remarked in the fourth section; and for that reason we have not been able to give any particular rules concerning them. But as for the right of accretion, seeing the dispositions of testators may ofttimes give occasion to it, and seeing we have in the Roman law many rules concerning it, which may be rendered clear and certain, we have composed this section of them; and we have endeavoured to set them in that light and order which is necessary to make them easy, as much as we have been able, amidst the difficulties which we have just now explained. For although Justinian did make a law,[s] one part whereof is in relation to this matter, and it is there said, that he had judged it necessary to examine it thoroughly, fully, and with exactness, in order to make it clear to every one's understanding, yet this project seems to be very lamely executed.

3279. After all that has been said of the right of accretion in this preamble, the reader is sufficiently advertised that this matter is of the number of those which are common to testamentary institutions and legacies, to fiduciary bequests and substitutions,

[r] *Cujac. ad titul.* 24 *Ulp.*

[s] *L. un.* § 10, *C. de caduc. toll.* [This right of accretion in the civil law is the same as the right of survivorship in the common law of England; and Bracton, De Legibus, lib. 4, fol. 262. b, speaking of survivorship, calls it expressly by the name of *jus accrescendi*; which shows that the law of survivorship is originally derived from the civil law, and therefore the rules laid down in the civil law touching the right of accretion must be of great use to decide any difficulties that may arise in relation to survivorship. But there is this difference to be taken notice of between survivorship at common law and the right of accretion in the civil law, that survivorship at common law takes place, not only in successions and inheritances, but likewise in grants and other conveyances; whereas the right of accretion by the civil law takes place only in successions of intestates and all testamentary dispositions, but not in contracts and deeds of gift. *Perez. in Cod. lib.* 6, *tit.* 55, *no.* 9.]

and that the rules which shall be explained in this section relate chiefly only to testamentary successions. For although, in the beginning of this preamble, we have given for an example of the right of accretion, that which hath place among heirs at law, yet that was only to make the nature of this right more intelligible in testamentary successions, to which the use of the rules concerning this matter ought to be restrained, since in legal successions there can happen no difficulty, every heir having his natural right to the whole, when he is left all alone. So that, as to the right of accretion in legal successions, we shall make no express mention thereof, except in the third article; which, however, will be no hindrance why we may not apply to them whatever is in the other articles, that may suit with them.

ART. I.

3280. *Use of the Right of Accretion.* — When there are two or more heirs or executors of one and the same succession, or two or more legatees of one and the same thing, and some one of the said executors or legatees takes no part of the inheritance or legacy, whether it be that he renounces it, or that he is found to be incapable or unworthy of it, or that he chances to die before the testator, the portion which he was to have had goes to the other executors, or other legatees, according as the disposition of the testator ought to have this effect; which depends on the rules that follow. And it is the same thing among several persons to whom an inheritance or a legacy is left by substitution, or a fiduciary bequest.[a]

II.

3281. *Definition of this Right.* — The right which executors, legatees, and the persons substituted to them, have to reap the benefit of the portions of one another, when there are any among them who will not or cannot take the portions belonging to them, is called the right of accretion, because the vacant portion accrues to the portions of the others.[b]

III.

3282. *Accretion among Coheirs at Law.* — Among coheirs at law there is always a right of accretion: for the inheritance be-

[a] See the following articles.

[b] See the articles which follow.

longs to the nearest of kin who is capable of succeeding. Thus, he ought to have it entire, if there be no coheir, or if those who were called to the inheritance with him would not, or could not, take their part in it.[c] But if one of the coheirs should die after the succession was open, when he did not know that it was, or before he had accepted it, he would transmit his right to his heirs, and his coheir would have no part in his portion by accretion.[d]

IV.

3283. *In Testaments it depends on the Manner in which the Executors or Legatees are joined together.* — The right of accretion in testamentary dispositions depends on the manner in which the testator hath explained his intention among several executors, several legatees, or several persons substituted to them, and on the conjunction which the words of the testator make among them. For it is according as they are joined together by one and the same right, or as their portions are distinct, that they have the right of accretion, or that they have it not; which depends on the rules that follow.[e]

V.

3284. *Three Manners in which Executors or Legatees may be conjoined.* — Two or more executors or legatees may be joined, or called jointly to the same inheritance, or to the same legacy, in three manners. The first is, when they are conjoined only by the inheritance, or the thing that is left them, and called to it by different and separate expressions; as if a testator institutes one executor by a first clause, and by a second another executor; or if he bequeaths a thing to one legatee, and afterwards calls another legatee to the same thing. The second manner is, when the testator joins the persons both by the thing and by the expression; as if in one and the same clause he institutes two executors, or names two legatees of the same thing. The third is, when the testator joins the persons only by the words, and distinguishes their portions; as if he should institute two executors, or bequeath the same thing to two persons by equal portions.[f] We

[c] *L.* 9, *D. de suis et legit. hæred.*

[d] This is a consequence of our rule, *that the dead gives seizin to the living.* For this heir having succeeded before his death, his right would be vested in him, and would pass to his heirs.

[e] See the articles which follow. See the eighth article.

[f] *L.* 142, *D. de reg. jur.*; — *l.* 89, *D. de legat.* 3. Although this distinction has been ex-

shall see in the articles which follow the use of these three sorts of conjunction or union.

VI.

3285. *Among Coheirs or Coexecutors there is always a Right of Accretion.* — When the question is about the inheritance or succession, in what manner soever it be that the heirs or executors are called to it, whether jointly or separately, and whether their portions be distinguished or not, there is always among them a right of accretion. For as the right to the inheritance is a universal right, which comprehends all the goods and all the charges, and this right is indivisible, that is, one cannot be heir only for a part, so as that the other part remain vacant and be without heirs, the portions of those who are not willing or who are not capable to succeed are acquired to the others. Thus, the heir who has once accepted his own portion will succeed to that which shall be vacant, without having the liberty to renounce it, and he will be liable to bear the charges of it; which is to be understood not only of the heirs instituted in the first place, but also of those who are substituted to them; whether it be that the several heirs are substituted one to another, or that other persons are substituted to the heirs. For in all these cases, he who hath acquired one portion of the inheritance, whether as being instituted in the first place, or as being substituted, cannot renounce the other portions, which, by the effect of the institution or substitution, may accrue to him.[g]

Remarks on the Preceding Article.

3286. What is said in this article, that a portion of the inheritance cannot remain vacant, and that he to whom it ought to accrue cannot refuse it, is not contrary to what hath been said in the preamble of this section, that it would have been noways against the law of nature if the vacant portion were left to the heir at law;

plained in the preamble, yet it was necessary to repeat it here. For we were obliged to speak of it in the preamble, in order to help the explaining of the difficulties mentioned there; and it ought to be placed here, as being a part of the rules.

We shall see, in the three following articles, the reason why in the third of these manners the example is given only of legatees, and not of heirs or executors.

[g] *L.* 53, § 1, *D. de acq. vel omitt. hæred.*; — *l.* 35, *eod.*; — *l.* 6, *C. de impub. et aliis substit.*; — *l. un.* § 10, *C. de caduc. toll.*; — *l.* 2, *C. de hæred. inst.* See, as to what is said in this article, that the right of the heir is universal and indivisible, the eleventh and twelfth articles of the first section of *Heirs and Executors* in general.

although in that case it would be true that this heir at law, to whom the vacant portion ought to belong, might refuse it. For the rule which ordains that the vacant portion cannot be refused by him to whom it ought to accrue, presupposes that he has accepted his portion, either purely and simply, or with the benefit of an inventory: and it is only in this case that he cannot refuse the other portions on the same condition upon which he has accepted his own. And since he would be at liberty to refuse the other portions if he had not accepted his own, so it would be equally just that this heir at law, who had entered into no manner of engagement on account of the inheritance, should have it in his power either to accept of the vacant portion or to refuse it. There would be in all this nothing contrary to justice or equity: and the same thing may be seen in our customs, since it is certain that if it should happen that, an heir at law having accepted the inheritance, the universal legatee should renounce the legacy, this heir, who could have no share in the goods comprised in the legacy if the legatee had accepted of it, could not, upon the legatee's refusal, renounce those goods, in order to get rid of the charges; but he would be accountable to the creditors for all the debts of the inheritance, and for the particular legacies, to the value of what the testator had power to bequeath.

VII.

3287. *The Accretion among Coheirs or Coexecutors is regulated according to their Portions in the Inheritance.* — When there is a right of accretion between several, who are either instituted or substituted heirs or executors, those to whom the vacant portions accrue have their share in them, in proportion to the shares which they have in the inheritance.[h]

VIII.

3288. *The Coheirs have this Right differently, according as they are conjoined or disjoined from one another.* — The right of accretion among heirs or executors is not always such, as that they all have this right reciprocally between them. For if a testator divides his

[h] Cum quis ex institutis qui non cum aliquo conjunctim institutus est, hæres non est, pars ejus omnibus pro portionibus hæreditariis accrescit. Neque refert primo loco quis institutus, an alicui substitutus hæres sit. *L.* 59, § 3, *D. de hæred. inst.* It is to be remarked on this text, that for the right understanding of these words, *non cum aliquo conjunctim*, the reader needs only to consult the following article.

succession in portions, and gives, for instance, one half to two or more heirs, and the other half to some others; one of these heirs not succeeding, his portion will remain in the mass of that half of which it was a part, and will accrue to the coheirs of the said half, and not to the coheirs of the other half. But if there were any one of the heirs who was instituted singly by himself for a moiety, or some other portion, of the inheritance, and he could not or would not take it, it would accrue entire to all the other heirs, without distinction, according to their portions in the inheritance.[1]

IX.

3289. *This Right hath Place among Coheirs who are not conjoined.* — If in the case of the preceding article all those who were called to a portion distinct from the others were incapable of succeeding, or should renounce their portion, the right of accretion, which took place only among them for their parts, as long as any one of them was capable of succeeding, would pass to the other heirs of the other portions, and that portion which should become vacant would accrue to them. For in that case, seeing that portion could not remain vacant when there is an heir to the other, he would have the whole; and he could not confine himself to his own portion, and renounce that which had become vacant, although it should be found to be burdensome, by reason of the charges laid upon it; because the inheritance, as has been said in the sixth article, is indivisible: and the heir who happens to be left alone, although he was instituted heir only for a portion, ought to accept the whole inheritance.[1]

X.

3290. *Among Legatees of one and the same Thing there may be or may not be a Right of Accretion.* — It is not the same thing as to the right of accretion, between legatees, as between coheirs or coexecutors; for the right to the inheritance being a universal right, and indivisible, there is always among coheirs or coexecutors a right of accretion; but legacies being restrained to the things bequeathed, which may be divided at least by estimation, although the things should be indivisible in their own nature, it is not ne-

[1] *L.* 63, *D. de hæred. inst.*; — *l. un.* § 10, *C. de caduc. toll.* See the following article.

[1] See the sixth article, and the texts cited on it.

cessary that there should be always a right of accretion among legatees. But they either have or have not this right among them, according as the expression of the testator may give it them, or exclude them from it, as shall be explained by the rules which follow.[m]

XI.

3291. *There is a Right of Accretion among Legatees who are conjoined by the Thing.* — If a testator bequeaths one and the same thing to two or more legatees, without any mention of portions, as if he gives and bequeaths a house to such a one and such a one, these legatees being conjoined by the thing bequeathed, there will be between them a right of accretion, in the same manner as if the testator had added, that the thing should belong entirely to him of the two legatees who should be left alone to reap the benefit of the legacy. Thus, it is only their concurrence that divides the legacy between them, and gives to every one his part of it: and if one of them cannot or will not receive his portion, it remains to those who have taken or shall take theirs.[n]

XII.

3292. *If the same Thing is bequeathed to Two Persons by Two Clauses, each has a Right to the Whole, but their Concurrence divides it.* — If a testator had bequeathed the same thing to two legatees by two different expressions and separately, as if, having bequeathed a house by a first clause to a first legatee, he bequeathed it again afterwards to another legatee by another clause, such a legacy might be conceived in three manners, which would have three different effects. The first in such a manner as that, in the second legacy, the intention of the testator should appear to be to revoke the former; and in this case the first legacy would remain null. The second, so as that he would have each of the legatees to have the whole legacy, the house going to one, and the heir being charged to give the value of it to the other legatee; which would be executed, provided the said intention were express and clearly explained. The third is, if by the two clauses of the testament the house were bequeathed entire to each of the two legatees; and in this case, they both accepting the legacy, their con-

[m] See the following articles.

[n] *L.* 80, *D. de legat.* 3; — *l.* 3, *D. de usufr. accresc.*; — *Ulp. tit.* 24, § 12. See the fifteenth article.

currence would divide it, and each of them would have the half of the thing bequeathed in this manner. But if in this last case there should be one of the two legatees who either could not or would not have any share in the legacy, the whole would belong to the other; not so much by right of accretion, as that because the whole was given him, and that his right not being diminished by the concurrence of the other, it would remain entire to him, but with the charges which ought to pass to this legatee, according as the disposition of the testator should demand it; for there might be some of the charges limited to the person of the other legatee, who would take nothing.°

° We make use of this example, which in all appearance will not happen; but it is because it is frequent in the Roman law, and that it explains one of the manners of union or conjunction spoken of in the fifth article. It is of this manner that it is said, that one and the same thing may be bequeathed to two persons separately, *disjunctim, separatim*; and it conjoins the legatees by the thing. This conjunction had this effect in the ancient law of the Romans, that each of those legatees had the whole (*Ulp. tit.* 24, §§ 12 *et* 31), that is, one the thing, and the other the value of it. Which was altered by Justinian, and regulated in the manner as it is expressed in this article, as will be seen by the text which follows.

Ubi legatarii vel fideicommissarii duo forte, vel plures sunt quibus aliquid relictum sit. — Sin autem disjunctim fuerit relictum: si quidem omnes hoc accipere et potuerint et maluerint, suam quisque partem pro virili portione accipiat. Et non sibi blandiantur ut unus quidem rem, alii autem singuli solidam ejus rei æstimationem accipere desiderent: cum hujusmodi legatariorum avaritiam antiquitas varia mente susceperit, in uno tantum genere legatorum eam accipiens, in aliis respuendam esse existimans. Nos autem omnimodo repellimus, unam omnibus naturam legatis et fideicommissis imponentes, et antiquam dissonantiam in unam trahentes concordiam. Hoc autem ita fieri sancimus, nisi testator apertissime, et expressim disposuerit, ut uni quidem res solida, aliis autem existimatio rei singulis in solidum præstetur. Sin vero non omnes legatarii, quibus separatim res relicta sit, in ejus acquisitionem concurrant: sed unus forte eam accipiat: hæc solida ejus sit, quia sermo testatoris omnibus prima facie solidum assignare videtur: aliis supervenientibus partes a priore abstrahentibus, ut ex aliorum quidem concursu prioris legatum minuatur. Sin vero nemo alius veniat, vel venire potuerit, tunc non vacuatur pars quæ deficit, nec aliis accrescit, ut ejus qui primus accepit, legatum augere videatur, sed apud ipsum qui habet solida remaneat, nullius concursu diminuta. Et ideo si onus fuerit in persona ejus apud quem remanet legatum adscriptum: hoc omnimodo impleat, ut voluntati testatoris pareatur. Sin autem ad deficientis personam hoc onus fuerit collatum, hoc non sentiat is qui non alienum, sed suum tantum legatum imminutum habet. Sed et varietatis non in occulto sit ratio: cum ideo videatur testator disjunctim hoc reliquisse, ut unusquisque suum onus, non alienum agnoscat. Nam si contrarium volebat, nulla erit difficultas conjunctim ea disponere. *L. un.* § 11, *C. de caduc. toll.*

Si quidem evidentissime apparuerit, ademptione a priore legatario facta, ad secundum legatum testatorem convolasse, solum posteriorem ad legatum pervenire placet. Sin autem hoc minime apparere potest, pro virili portione ad legatum omnes venire; scilicet, nisi ipse testator ex scriptura manifestissimus est, utrumque eorum solidum accipere voluisse. *L.* 33, *D. de legat.* 1.

Although this last law be taken out of the Digest, yet those who are acquainted with the style of the ancient lawyers, the authors of the texts which are collected together in

XIII.

3293. *Among Legatees by Portions there is no Accretion.* — If the same thing is bequeathed to two or more legatees, but so as that the testator divides it among them, as if he bequeaths it to them by equal portions, or assigns to every one his own, there will be no right of accretion among them. For their title divides them, and gives to every one his right to his legacy separated from that of the others, and restrained to his own portion. So that, if any one of the portions of these legatees should become vacant, the others would have no right to it;[p] but it would go either to the heir or executor, if it was he that was charged with the legacy, or to a legatee, if the testator had charged one legacy with this other; as if he had devised a land or tenement to a legatee, and had charged him to give to others, either a portion of the said land, or the usufruct of the whole or of a part thereof, or a sum of money to be divided among them.

XIV.

3294. *Divers Cases of Accretion between Joint Legatees.* — If it should happen that, one and the same thing being bequeathed jointly, and without distinction of portions, to several persons, as has been mentioned in the eleventh article, one of the legatees, being a posthumous child, should not come into the world, or that another legatee should happen to be dead before the making of the testament, and the testator knew nothing of it, the portions which, by these events, would become vacant, would accrue to the

the Digest, and with that of Tribonian, will easily perceive that these expressions are of his style; and that he has accommodated this law to the change which Justinian had made by the other law which has been just now quoted, having abolished that ancient law which gave the whole thing to each of the legatees to whom it was bequeathed separately, in the manner explained in this article.

We have said at the end of the article, that the legatee who shall have the whole legacy shall acquit the charges which ought to pass to him according to the disposition of the testator; and we have not said, in general, as it is expressed at the end of the first of these two texts, that he would not be bound for the charges which the testator had imposed on the other legatees of the same thing, and who should take no share in it. For besides that it is very difficult, not to say impossible, for a legatee to refuse a legacy, if the charge does not exceed the value of it; yet although this case should happen, it would be by the circumstances, and by the manner in which the testator had expressed himself, that we ought to judge if his intention was, that the charge imposed on the legatee who should take no part of the legacy should be limited to his person, or that it should affect the thing bequeathed, and that it ought to pass to the legatee who should have the whole legacy to himself.

[p] *L.* 1, *D. de usufr. accresc.*

others.[q] And it would be the same thing if one of these legatees, who was alive when the testament was made, should happen to die before the testator.[r]

XV.

3295. *Accretion in Legacies and Successions is a Consequence of the Conjunction by the Thing.* — It results from all the rules which have been here explained, that, the right of accretion among heirs or executors being an effect of the rule which ordains that the inheritance cannot be divided so as that part thereof shall go to the testamentary heir, and part thereof to the heir at law, the said right is acquired by the thing itself, that is, by the inheritance. From whence it follows, that the inheritance ought to go entire to him who happens to be the only person who is to succeed, whether he was united to others by the expression, or was called to the succession separately, or was even restrained to one distinct portion. For seeing this portion cannot remain to him single by itself, it draws to him the portions of the others when they become vacant; so that it is always by the thing that heirs or executors are conjoined with one another. And among legatees the right of accretion is likewise an effect of their being conjoined by the thing, as appears by the rules explained in the articles which relate to the legacies.[s]

[q] *L.* 16, § 2, *D. de legat.* 1; — *l. un.* § 3, *C. de caduc. toll.*

[r] *D. l. un.* § 4.

[s] Si totam, an partem ex qua quis hæres institutus est tacite rogatus sit restituere, apparet nihil ei debere accrescere, quia rem non videtur habere. *L.* 83, *D. de acquir. vel omit. hæred.*

We do not quote here this text because of the rule that is explained in it, that he who is charged with a tacit trust of the inheritance, or a part of it, has not the right of accretion; for if the fiduciary bequest be in favor of a person to whom the testator could not give any thing, neither the person for whom the trust is created, nor the heir that is charged with it, will have any share in the fiduciary bequest. And if it be in favor of a person to whom the testator might lawfully give, it will be very evidently the person for whom the trust is who will have the benefit of the right of accretion, if it is to take place; and it will be his business to regulate it with the person who is charged to restore to him the whole inheritance or a part of it. But we have put down here this text only on account of these last words in it, *quia rem non videtur habere*, because they show that it is to the thing that the right of accretion is annexed; which is a principle that we thought necessary to be explained in this article. See the texts cited on the eleventh article.

SECTION X.

OF THE RIGHT OF TRANSMISSION.

3296. When an heir or executor has accepted a succession, if he dies afterwards, it is without doubt that he transmits the said succession, that is, makes it to pass to his heirs and executors with his other goods. If a legatee dies after he has acquired his right to the legacy, he transmits it in the same manner to his successor; and it is not of this manner of transmitting that we treat here. But if the heir or executor, or legatee, dies before he has known or exercised his right, it does not appear to be so certain that they transmit it in this case to their heirs and executors. And this doubt had given occasion in the Roman law to many questions, concerning which several rules have been made, which mark differently in what cases heirs and legatees transmit, or do not transmit, their right to their heirs; that is, in what condition their right ought to be at the time of their death, in order to make it pass from them to their successors.

3297. Although the right of transmission in the Roman law respects successions of intestates as well as testamentary successions, and it may seem for this reason that we ought to have treated of this matter among those which are common to the two sorts of successions, yet we have placed it among the matters relating to testaments. For in our usage there can be no difficulty as to the transmission of legal successions, because of our rule, *that the dead gives seizin to the living*, as shall be explained hereafter. Thus, the rules which concern the difficulties of transmission are in our usage limited to testamentary dispositions, whether it be for legacies and fiduciary bequests, or for inheritances.

3298. We may make the same remark on the rules of the Roman law which concern the right of transmission, as we have made on those relating to the right of accretion, that the origin of transmission, as well as that of accretion, is found in the natural order of legal successions. For as the right of accretion between two children, for example, who survive their father, is founded upon this, that it is natural, when the two concur together, for them to divide the inheritance between them, and that, if one of the two be left alone, he should have the whole; the right of transmission is founded upon this, that it is natural also, if a son who

has outlived his father happens to die before he has entered upon the succession, or even before he knew of his father's death, that he should transmit to his children the right which he had, and that his children taking his place should use his right, which becomes theirs. Thus, he transmits to them the right which he had acquired by the death of his father, and he would transmit it in the same manner to other heirs, whether heirs by testament or heirs at law, because this succession had passed naturally to him, and was become a part of the goods of his own inheritance. It was in this manner that the use of transmission began in the Roman law; but it was limited to the children who were under the power and jurisdiction of their father when he died, and who were called *sui hæredes*. And the children who were emancipated, not being *sui hæredes*, they had not this right of transmission, if they died before they knew and had exercised their right to the inheritance.[a] And it was the same thing, and that with much more reason, as to the other heirs of blood.[b]

3299. As for testamentary successions, there was no transmission in them, unless the testamentary heir or executor had known and exercised his right;[c] and even children who were instituted heirs or executors by the testament of their parents were deprived of it, as well as strangers, and they began to have the right of transmission of the testamentary successions of their ascendants only by a law of the Emperors Theodosius and Valentinian, who gave to children and other descendants this right of transmission, not indifferently to transmit the testamentary successions of their ascendants to their executors, whether they were strangers or relations, but only in favor of their children and other descendants.[d] And seeing this law speaks only of testamentary successions, and not of successions of intestates, the most learned of the interpreters have been of opinion that it made no change in the successions of intestates, and that the children who are not *sui hæredes* have by this new law the transmission only of what goods come to them by virtue of the testamentary dispositions of their ascendants; and that as to the successions of intestates the ancient law subsists, which does not give the transmission to children who are not emancipated, but only to those who, being under the father's juris-

[a] *L.* 4, *C. qui adm. ad bon. possess. poss.*; — *l.* 2, *C. ad senat. Orph.*
[b] *L.* 9, *D. de suis et legit. hæred.*
[c] *L. un.* § 5, *C. de caduc. toll.*
[d] *L. un. Cod. de his qui ante apert. tab.*; — *l. un.* § 5, *Cod. de caduc. toll.*

diction, were *sui hæredes*. Thus, we see that by the Roman law the transmission has place in testamentary successions only for children, and in legal successions only for such children as were not emancipated. And as for all other heirs, whether heirs by testament or heirs at law, they had not this right if they died before they knew that the succession was fallen to them, or before they had entered upon it.[e] And this rule was so strictly observed, that although it were because of absence that the child was ignorant of the death of his father, he had no right of transmission if he died in that ignorance of his right. And it was out of mere favor that the Emperor Antoninus excepted the case of absence on account of the public.[f]

3300. There was another exception in favor of heirs, whether heirs by testament or heirs to intestates, who died within the time which the law gave the heir to deliberate whether he would accept of the inheritance or refuse it. And they who died within the said time, without explaining their intentions therein, transmitted their right to their heirs.[g]

3301. As to legatees, their condition, in what concerned the right of transmission, was more advantageous in the Roman law than that of the heirs or executors: for they acquired their right the moment that the testator died, if the legacy was pure and simple; and if the legacy was conditional, the right of the legatee depended in that case, as it was but just, on the accomplishment of the condition, and he did not acquire it till the condition was accomplished.[h] Thus, the legatee of a legacy pure and simple happening to die after the testator, without knowing any thing of the legacy, transmitted his right to his heir; and if the legacy was conditional, and the legatee died before the condition was fulfilled, as he had acquired nothing himself, so he transmitted nothing to others; which was also natural and just.

3302. This difference between the condition of legatees and that of heirs or executors, as to what concerns the right of transmission,

[e] *L.* 7, *Cod. de jure delib.*; — *l. un.* § 5, *C. de caduc. toll.*

[f] *L.* 86, *D. de acq. vel omitt. hæred.*

[g] See the eighth article of this section. There was another case in the Roman law, where the testamentary heir transmitted his right, if he died before he entered upon the inheritance. But seeing this case has no conformity with our usage, we do not explain it here; and we only take this notice of it here to satisfy those who might be apt to find fault with the omission, and those who may have a mind to consult it in its proper place. *V. l* 3, § 30, *D. de senat Silan.*; — *l. penult. C. de his quib. ut ind.*

[h] See the tenth, eleventh, and twelfth articles of this section.

had been established in order to avoid an inconvenience, which would have happened if the right of the legatee had not vested in him at the moment of the death of the testator. For seeing in the Roman law the validity of the legacies depended on the acceptance of the inheritance, so that if the heir or executor renounced the inheritance, the legacies remained null, as has been explained in its proper place,[i] it might have happened that, if the right had not vested in the legatee but by the executor's acceptance of the succession, which depended on the executor, and which the executor might put off, the legatee who should die in the interval between the death of the testator and the executor's acceptance of the inheritance would have lost his right, and have transmitted nothing to his heirs. It was for the preventing of this inconvenience, that it was regulated, in regard to legatees, that the right to the legacy should be vested in them at the moment of the death of the testator, that they might have the right of transmitting it to their heirs. Thus, it was a favor which was granted them, to distinguish their condition from that of the heirs or executors, in what concerns transmission. And as this favor was granted only to prevent that inconvenience, so it had not place in the cases where the inconvenience was not to be feared. Thus, for legacies which could not be transmitted, such as a legacy of the usufruct of any thing, or a legacy of liberty to a slave, which are legacies confined to the persons of the legatees, the legatees did not acquire their right to them but from the day of the heir's entering upon the inheritance.[l]

3303. In our usage the transmission of successions of intestates takes place indifferently, not only for children, but also for all the next of kin, whether they be descendants, ascendants, or collateral relations. For according to our rule, *the dead gives seizin to the living, his next lineal heir who is capable of succeeding to him*, of which mention has been made in another place,[m] the heirs of blood

[i] See the nineteenth article of the fifth section of this title, and the remark that is made upon it.

[l] *L. un.* § 2, *D. quando dies ususfr. leg. ced.*; — *ll.* 2 *et* 8, *D. quando dies leg. ced.* But if this legatee of a usufruct, having survived the testator a whole year, had died before the heir had accepted the succession, would it have been just that the heir of the said usufructuary should lose the fruits of that year? This difficulty cannot happen in our usage, where equity would do justice to the usufructuary or to his heir. And one or other of them would have the fruits which ought to belong to him from the time that the succession was open, according to the disposition of the testator, and according to the rules of usufruct, which have been explained in the title of that matter.

[m] See the preface to this second part, no. 7.

acquire their right to the succession the very moment that it is open, although the death of the person to whom they succeed be unknown to them, and they be ignorant of their right to succeed, and do not so much as know that the deceased was their relation. It follows from this rule, that if the heir at law, or next of kin, who survived but one moment the person to whom he had right to succeed, happens to die immediately after him, without having exercised or known his right, he transmits it to his heirs.

3304. As for legacies, our usage gives to all legatees the right of transmission of pure and simple legacies, which may pass to their heirs; and if the legatee who has survived the testator dies before he had knowledge of the legacy, he transmits it nevertheless to his heir in the same manner as the heir at law or next of kin transmits to his heir the inheritance.

3305. There remains, then, no other difficulty, except in the transmission of testamentary successions; and there would remain none even in that, if the rule which gives the right of transmission to legatees when they have outlived the testator had been extended to testamentary heirs or executors. A rule so easy and so plain as this would have put an end to many difficulties which still remain in the principles of the Roman law concerning this matter, and would have removed inconveniences therein, which seemed to deserve that some provision should have been made to guard against them, as well as those relating to legatees. For if it would be hard for a legatee who should die before the executor's accepting of the inheritance, that he could not transmit his right to his heirs, it would not be less hard for children, or other successors of an executor, that because he was ignorant of his right to the inheritance, whether through absence or for other causes, he could not transmit it if he died in this ignorance; and that thus a mere chance should distinguish his condition from that of an executor who should die after he had known of his right, although he had made no step towards exercising it. For he would nevertheless transmit his right to his heirs, if he died within the time which the law allowed to testamentary heirs or executors for deliberating, as has been already observed.

3306. It seems very strange that by this law the testamentary heir, who has known his right, and neglected it, should transmit to his heirs the succession that was fallen to him; and that if the same heir had been ignorant of his right, he could have transmitted nothing. This inconvenience might have been sufficient

to justify a rule, which, at the same time that it removed the inconvenience, would have besides been useful to put an end to all the difficulties of this matter. And it is without doubt upon this consideration, that, in one of the provinces of France where the Roman law is most followed, they have established it as a rule or custom, *that the dead gives seizin to the living, in what manner soever he succeeds, whether by testament or without testament.*[n] And if this rule be just in the Roman law for legatees, that they should have their right at the moment of the death of the testator, what injustice would there be in it, if it should take place likewise for the testamentary heirs or executors? since it is true of the testamentary heirs, as well as of legatees, that they hold their right by the same title of the will of the testator, and of the law which authorizes the said will; and that this title is still more favorable for the said heirs or executors than for legatees, whom the testator has less considered than his heir or executor; and, in a word, that the testament having its effect by the death of the testator, it is at the moment of the said death that the testamentary heir ought to take the place of him to whom he succeeds. And it is also the rule, that, at what time soever afterwards the said heir or executor accepts of the inheritance, he is considered as if he had accepted it at the moment of the said death, and is bound in the same manner for all the charges that were fallen due before he accepted the succession.[o]

3307. Will it be objected against the transmission of an inheritance in the case where the testamentary heir died without knowing any thing of the testament, that one cannot acquire a right which he knows nothing of; and that, the quality of heir or executor implying engagements, it is necessary for acquiring an inheritance that the heir or executor should know the right which is fallen to him; and that therefore he, having been ignorant of it, has had no share in the inheritance, and consequently could not transmit it to his heirs? But these reasons would prove in the same manner, that there would be no transmission even in successions of intestates; and they would prove likewise, that the legatees who had known nothing of the legacies left them could not transmit them to their heirs, at least those whose legacies should be subject to some charges.

[n] See the customs of Bourdeaux and country of Guienne, article 74.

[o] See the fifteenth article of the first section of *Heirs and Executors* in general.

3308. Will it be said that the testator has considered only the persons of his executors, and not the persons of their successors, and that therefore, the executor being dead without having acquired the inheritance, his heirs or executors ought to have no share in it? But this reason would prove the same thing as to legatees; and since it proves nothing with respect to them, neither ought it to prove any thing with respect to executors. Thus, the only natural effect of this reason would be to prove, that, if he who is instituted heir or executor dies before the testator, the institution does not pass to his heirs; but if the said heir or executor survives the testator, it would be against his intention to deprive him of the right of transmission, since every testator means, that, if those whom he institutes his heirs or executors do survive him, all the goods of the inheritance should be theirs in the moment that his death should divest him of them. To which we may likewise add this consideration, which is common both to the executor and to the legatee, that it is not absolutely true that the testator hath only considered their persons. For it is very usual for a friend to institute his friend his heir or executor in consideration of his children, and to leave a legacy to a friend upon the same motive; so that the transmission in these cases is agreeable to the intention of the testator. But even in the cases where the intention of the testator is confined to the sole person of the executor and legatee, the right of transmission is not therefore the less comprehended in the disposition of the testator. For it is for the interest of the executor and of the legatee, that the goods which come to them by a testament should pass to the use of their affairs, whether it be to acquit their debts, or for other uses, which cannot be done except by the right of transmission. Thus, it may be said that, the right of transmission being founded on all these principles of equity, it was not so much a favor done to the legatees in the Roman law, as an act of justice, in giving them the right of transmission, although they should happen to die before they knew any thing of the legacy; and that the same justice might be likewise extended to testamentary heirs or executors without any inconvenience.

3309. It seems reasonable to conclude from all these reflections, that, since neither natural equity nor reason renders the condition of the testamentary heir worse than that of the legatee, it would have been just to have made it equal as to the right of transmission; and that the rule which should have ordered it so, being

founded on principles so natural as these, would have been much more useful than the several subtilties which one meets with in this matter, as well as in others of the Roman law. So that it would have been convenient that the rule, *the dead gives seizin to the living*, had been made common throughout in successions by testament, as well as those without testament, as we have seen that it is in one of the provinces of France where the Roman law is most in use, and where they have very prudently judged, that it is much more useful to establish transmission without distinction in all sorts of successions, whether it be an heir that succeeds by testament, or without testament, whether he knew of his right, or died before he knew any thing of it, than to introduce distinctions full of inconveniences without any advantage, and serving for no other use than to give occasion to many lawsuits. It is without doubt upon these considerations, that, although this particular custom in one province, which is governed by the written law, seems to insinuate that in the others they follow the Roman law, yet some authors have thought that, the maxim, *that the dead gives seizin to the living*, is become universal throughout the whole kingdom in testamentary successions, as well as in successions of intestates.

3310. It is to be remarked on this matter of transmission, that it contains some particular rules which would be of necessary use, even although transmission should take place in testamentary successions; as, for example, that which concerns the transmission of conditional dispositions: and that there are also other rules which relate to the transmission of legal successions, such as those which are explained in the first articles, which regard in general the nature of transmission.

3311. All these several sorts of rules shall be explained in this section, and shall take in every thing that belongs to this matter of transmission. But seeing the use of rules and principles is much facilitated by the application of them to the particular cases to which they may agree, and that we have been obliged to explain many of these cases in the ninth section of the title of *Legacies*, the reader may be pleased to have recourse to that section at the same time that he reads this.

ART. I.

3312. *Definition of Transmission.* — Transmission is the right which heirs or executors, or legatees, may have to convey down

to their successors the inheritance or legacy which belongs to them, in case they die before they have exercised their right.[a]

II.

3313. *To what Transmission is limited.* — It results from the definition explained in the preceding article, that when the heir or executor has entered upon the inheritance, and the legatee has received the legacy, it is not any longer by the transmission that their right passes to their heirs, but barely by succession, in the same manner as their other goods.[b] For transmission is understood only of the right which the heir or executor, or legatee, may have to convey to his heirs a right which he himself had never exercised, and which may have been altogether unknown to him, as will be seen in the sequel of this section.

III.

3314. *Transmission takes Place when the Right is acquired.* — The heir or executor and the legatee have this in common, that both the one and the other have the right of transmission, at the same time that the right to the inheritance, or to the legacy, vests in them. For having at that time their right in their own persons, it is a consequence thereof, that they should transmit it to their heirs, even although they themselves should die before they had received any thing, the one of the inheritance, or the other of the legacy; as, on the contrary, if when they die they had no manner of right in their own persons, they could transmit nothing to their successors.[c]

IV.

3315. *The Transmission depends on the Condition in which the Right is at the Time of the Death.* — It follows from the preceding articles, that, when the question is about the right of transmission, it is necessary to consider in what condition the right of the heir or executor, or that of the legatee, was at the time of his death. And this depends on the rules which shall be explained hereafter.[d]

[a] *L. 7, in f. C. de jure delib.* See the preamble of this section.

[b] This is a consequence of the definition of the right of transmission.

[c] See the following article, as also the eighth and tenth articles. See, in relation to this article and those that follow, the sixth and the other following articles of the ninth section of *Legacies*.

[d] This is a consequence of the preceding articles.

V.

3316. *There is no Transmission if the Testamentary Heir or Legatee dies before the Testator.* — There is likewise this common to the testamentary heir and to the legatee, that although their rights have the testament for their title, yet nevertheless, if it happens that they die before the testator, although after making the testament, there is in that case no transmission; for the testament was not to have its effect but by the death of the testator. So that when their death precedes that of the testator, they have no right, and consequently do not transmit any thing.[e] And there would be still less ground for transmission if the testamentary heir or legatee were already dead before the testament was made, it being possible that the testator knew nothing of the death.[f]

VI.

3317. *The Institution and the Legacy may be conceived in Terms which make them to pass to the Heirs.* — We may add, as another rule that is common to testamentary heirs and to legatees, that if the testator had conceived his dispositions in such terms as to show that it was his will, that, in case his heir or executor, or his legatees, should chance to die before their right fell to them, the said right should pass to their children, or in general to their heirs; such a disposition would have its effect, not so much by the right of transmission, as by the proper right of the said children or heirs of the testamentary heir or legatee, who would in this case be called by the testator by way of substitution to the others.[g]

VII.

3318. *The Acceptance of the Inheritance gives the Right of Transmission.* — If he who is instituted heir by a testament, having accepted of the inheritance, should chance to die before he touched any thing thereof, he would transmit to his heirs the right to

[e] Pro non scriptis sunt iis relicta qui vivo testatore decedunt. *Ex §§ 2 et 3, l. un. C. de caduc. toll.*

[f] *L. 4, D. de his quæ pro non script.*

[g] Since the will of the testator holds the place of a law, nothing would hinder such a disposition from having its effect. And we have set down this rule here, because it is a precaution used by many for preventing the events which make the transmission to cease, by taking care to have added to the dispositions of testators, when it is their will that it should be so, some expression that may have this effect to make the inheritance or the legacy to pass to the successors of the testamentary heir or legatee, in their default; as is, for example, this expression, that the testator gives to such a one and his heirs.

gather in the effects belonging to it. For by his acceptance of it he had acquired the quality of heir, and the right to the inheritance.[h] Thus this right, as well as all the others which he might have, would pass to his heirs,[i] and that with much more reason than in the case of the rule that follows.

VIII.

3319. *The Testamentary Heir who dies within the Time for deliberating transmits his Right.* — If, during the time that the law gives the testamentary heir to deliberate in whether he will accept or refuse the succession, he happens to die without having done any one act as heir, he knowing of the testament, whether it be that he was really deliberating about it, or that he had not in any manner explained his mind therein, but only that he had not renounced the inheritance; the law presumes from his silence that he was deliberating, and he transmits his right to his heirs, who may in their own right accept the inheritance or renounce it.[l]

Remarks on the Preceding Article.

3320. We have not set down in the article that which is said in the text cited, that the heirs of the heir have no more time for deliberating than what remained to the deceased. For if there remained only two or three days, or so little time that it was not possible for them to exercise their rights, equity would require that they should have a longer delay. And as it is not agreeable to our usage to be so very rigorous in such like cases, it would seem just to grant unto them the same delay that the ordinance of 1667, tit. 7, art. 1, gives to heirs to deliberate in, seeing that delay is only forty days after the inventory.

3321. We have mentioned in this article only the case where the testamentary heir knew of the testament, and died within the time allowed by the law for deliberating; and have said nothing of the case where the heir who knew of the testament had let the time for deliberating slip, without making any declaration, and died after the said time was expired. For although by the Roman law that heir did not transmit his right to his heirs,[a] yet our usage seems to be opposite to that rigor.

3322. And seeing by the ordinance of 1667 the delay for de-

[h] See the first article of the third section, *In what Manner a Succession is acquired.*
[i] *L.* 37, *D. de acq. vel om. hæred.*
[l] *L.* 19, *C. de jure delib.*
[a] *L.* 19, *C. de jure delib.*

liberating is only, as has been already mentioned, of forty days after the inventory, whereas by the Roman law they had whole years to deliberate in, and that this time of forty days would be too short a time to take away the right of transmission, it does not suit with our usage, as has been likewise already taken notice of, to observe this rigor in the cases of non-performance of that which ought to be done within a certain space of time, unless there were some equity in the strict observance of the said rigor: as, for example, to exclude one who had a right to dissolve a sale by virtue of a power or equity of redemption, and who should not come within the time fixed for bringing the action for that purpose. Thus, the heir and his successor would be always received to exercise their right, and would not be refused all such delays as should appear to be just and necessary.[b]

3323. But if the testamentary heir should chance to die before he knew of his right, would he transmit it to his successor, whether he died within the time allowed for deliberating, or after the said time? It might be urged in favor of the transmission, that as in the Roman law the heir who knew of his right did not transmit it, if he died without declaring his mind, having let the time pass which the law allowed him for deliberating, as has been just now observed, so it would seem to follow, by the rule of contraries, that this time ought not to run against the heir who should die without knowledge of his right; in the same manner as, in the Roman law, the time given to the heir at law to demand the possession of the goods that were fallen to him did not run against the heir who was ignorant that the succession was fallen to him.[c] And if it is just to grant a delay to the living heir, who was ignorant of his right, although the time regulated by the law be expired, as that delay is granted by an express rule of the ordinance of 1667, tit. 7, art. 4, is it not as equitable to grant to the successor of this heir, who begins to know the right of the deceased, the same delay which would have been granted to the deceased, had he been in a condition to demand it? And as it has been found just in the Roman law, that the heir who knew of his right, and died within the time allowed for deliberating, should transmit it to his successors, although he had done nothing to show his acceptance of the inheritance, provided only that he had not renounced

[b] See the ordinance of 1667, tit. 7, art. 4.

[c] *L. 2, D. quis ordo in bon. poss. servet.; — l. 8, C. qui adm. ad bon. possess. poss.*

it; may it not be said of the heir who dies in ignorance of his right, that the time for deliberating ought not to run against him? And it having been impossible for him to deliberate, some time for deliberating ought not to be refused to his successor. From whence it follows, that the transmission to this successor is as just as that to the heir of him, who, having known his right, had neglected it to the time of his death, which happened within the time allowed for deliberating, and who did, nevertheless, transmit the succession to his heirs, according to the rule explained in this article.

3324. The reader may join to these considerations the reflections which have been made on this subject in the preamble of this section, and particularly that which has been remarked touching the sentiment of those who think that it is at present the general usage of the kingdom, that the rule, *the dead gives seizin to the living*, extends to testamentary successions.

IX.

3325. *When the Institution or Substitution of an Heir is Conditional, he has no Right to transmit, unless the Condition be come to pass.* — If an institution of a testamentary heir, or a substitution, was conditional, and the condition not being come to pass at the time that the succession fell, or that the substitution could have taken place, the heir, or the person substituted to him, should happen to die; as he would have had no right himself, so he could transmit nothing to his heir. Thus, for example, if a testator had instituted or substituted one of his relations or friends, on condition that he had children, or in case he were married, his death happening before the condition, whether before or after the succession fell, or the substitution could take place, would have annulled in his person all use of the right to inherit the succession, and to transmit it.[m]

X.

3326. *Transmission of a Legacy that is Pure and Simple.* — As to the legatee, if the legacy is pure and simple, that is, without condition, his right vests in him at the time of the testator's death, as is

[m] § 9, *Inst. de hæred. inst.* It is the nature of conditions, that what depends on them should have its effect or remain null, according as they happen or not happen. See the first article of the eighth section.

explained in its place:[n] and if he chances to die before he has demanded or even known of his legacy, he transmits his right to his heirs.[o]

XI.

3327. *Transmission of a Conditional Legacy.* — If the legacy was conditional, that is, if it depended on the event of a condition, the right would not vest in the legatee till after the condition had happened; and if the legatee died before, as he had no right to the legacy himself, so he would transmit none to his heir. And although the condition should afterwards come to pass after the death of this legatee, yet this event would be useless to his heir. Thus, for example, if a testator had left a legacy on condition that his heir should die without children, and it happened that the legatee died before the heir, who afterwards died without children, this event would be useless, both to the legatee who was already dead, and to his heir, to whom he had not transmitted any right, he having had none himself.[p]

XII.

3328. *Transmission of a Legacy to an Uncertain Day.* — As there are legacies which are made to uncertain days, and which are conditional, as has been explained in its place,[q] these sorts of legacies are of the same nature with those which depend on other sorts of conditions: and as to what concerns the right of transmission, they are regulated in the same manner as other conditional legacies.[r]

[n] See the preamble of this section, and the first, second, and third articles of the ninth section of *Legacies*.

[o] *L.* 5, § 1, *D. quand. dies legat. vel fideic. ced.*; — *l. un.* § 1, *in f. C. de cad. toll.*; — *l.* 5, *D. quand. dies legat. vel fid. ced.*

[p] *L.* 41, *D. de cond. et dem.*; — *l.* 59, *eod.* See the fourth and eleventh articles of the ninth section of *Legacies*. It is necessary to remark on this article the difference which the laws make between conditions in testaments and those of covenants. The difference consists in this, that in the dispositions of testators there is only the testator himself who regulates the effect of his disposition; and if it does not expressly comprehend the heirs of him in whose favor the disposition is made, it is limited to his person, that is, if the right is not acquired to that person during his life, he can transmit nothing of it to his heir. But in covenants there are two persons, who treat both for themselves and for their heirs, if they are not excepted. Thus the effect of conditions in covenants passes to the heirs. See the thirteenth article of the fourth section of *Covenants*.

[q] See the twelfth and thirteenth articles of the eighth section.

[r] This is a consequence of the nature of these legacies, which, being conditional, are not transmitted, except in the case that the condition be come to pass before the death of the legatee, as has been said in the preceding article.

XIII.

3329. *The Rules of Transmission may be applied to Substitutions, and to Fiduciary Bequests.* — The rules which concern the right of transmission for testamentary heirs and legatees may be applied to those who are substituted to them, and to those for whose account any thing is devised in trust to others, whether it be the whole inheritance, or some particular thing, which the heir or a legatee had been charged to restore to them, according as these rules may be applicable to them. Which it is easy to discern, and therefore noways necessary to repeat the same rules with regard to them. Thus, when a testator hath substituted to his heir another heir, to succeed to him in case the first either could not or would not accept the succession; or has obliged his heir to restore the inheritance to another person when the said heir shall die; or a testator hath charged his heir or a legatee with a sum of money in trust, or with other things which ought to pass after their death, or within a certain time, to other persons: in all these cases the persons substituted, and the persons for whose account the fiduciary bequest is made, surviving those after whom they are called, and happening to die afterwards before they knew and exercised their right, or before the event of the conditions, if there were any, transmit or do not transmit their right in the same manner, and according to the same rules, which have been just now explained for heirs and legatees.[s]

SECTION XI.

OF THE EXECUTION OF TESTAMENTS.

3330. The execution of testaments is naturally the duty of the testamentary heirs, who, remaining masters of the goods, are bound for all the charges. And the legatees, on their part, and all the other persons interested in the execution of the testaments, have the liberty to look after it, and to procure the execution of what concerns themselves. But seeing there are some dispositions of testators, the execution of which depends solely on the integrity of the testamentary heir, and that those very dispositions, of which the parties concerned may sue for the execution, may remain without effect, either by reason of the death or absence of such parties,

[s] *L.* 11, § 6, *D. de legat.* 3; — *l.* 81, *D. de acquir. vel om. hæred.*

or by the knavery of the heir, or for other causes, care has been taken, by the use of executors of testaments, to have the wills of testators accomplished without any regard to the honesty or knavery of their testamentary heirs.

3331. In the Roman law we see very few examples of the case where the testator commits to other persons than to the testamentary heir himself the execution of his dispositions; and we do not find there any rule which hath established in general the use of executors of testaments, who are charged with the entire execution of the testament; whereas the use of executors of testaments is so much approved and favored by our customs in France, that they ordain all the movable goods of the succession to be put into the hands of those to whom the testator commits this function; and for this reason the executors are obliged to make an inventory of the goods, and the heir ought to be called to assist at the making of it; or the testator may, if he pleases, when he names an executor, ordain a certain sum of money to be put into his hands, for executing the dispositions which he shall commit to his care.

3332. Although these dispositions be not common to all the customs, and in many of them, as well as in divers places which are governed by the written law, there is little or no use of executors of testaments; yet seeing it is everywhere free for testators to name them, and that in general due care ought to be taken for the execution of testaments, we shall explain in this section what is essential to this matter, and what may be gathered from the Roman law concerning it.

ART. I.

3333. *The First Security for the Execution of Testaments is, that they be known, and deposited in some Public Place.* — The first precaution necessary for the security of the execution of the wills of testators is, that the testaments or other acts which contain their dispositions be known to all persons who have any interest under them, and that they be deposited in some safe place, where the parties concerned may have free access to them as occasion requires. And it is for this reason that the testaments which are sealed up, and kept secret, are opened in the manner which has been explained in its place,[a] and that the others remain in the hands of public notaries, who take down the minutes or in-

[a] See the eighteenth and nineteenth articles of the third section.

structions thereof, that they may give out attested copies thereof to those persons whom the said dispositions of the testators may any way concern.[b] And there are even some dispositions which, for the greater security, ought to be made public in a court of justice, and enrolled, that is, entered in the public register, that the memory of them may be preserved.[c]

II.

3334. *The Use of Executors of Testaments.* — Seeing there are often dispositions in testaments, the execution of which depends wholly on the integrity of the testamentary heirs, and that many heirs fail in the performance thereof, it is free for testators to commit to other persons the execution of their dispositions, which they are not willing should depend altogether on their testamentary heirs; and the persons to whom the testators give this power, are called executors of testaments.[d]

[b] See the fifteenth article of the first section of *Partitions* among coheirs or coexecutors.

[c] When testaments contain substitutions, they ought to be made public, as shall be said in its proper place. See the end of the preamble to the third title of the fifth book.

[d] In testamentis quædam scribuntur, quæ ad auctoritatem duntaxat scribentis referuntur, nec obligationem pariunt. Hæc autem talia sunt, si te hæredem solum instituam et scribam, uti monumentum mihi certa pecunia facias; nullam enim obligationem ex scriptura recipit, sed auctoritatem meam servandam poteris, si velis, facere. Aliter atque si cohærede tibi dato item scripsero; nam sive te solum damnavero, uti monumentum facias, cohæres tuus agere tecum poterit familiæ erciscundæ, uti facias, quoniam interest illius; quin etiamsi utrique, jussi estis hoc facere, invicem actionem habebitis. *L.* 7, *D. de ann. legat. et fideic.* Si quis Titio decem legaverit, et rogaverit, ut ea restituat Mævio: Mæviusque fuerit mortuus, Titii commodo cedit, non hæredis, nisi duntaxat ut ministrum Titium elegit. *L.* 17, *D. de legat.* 2.

Si testator designaverit per quem desiderat redemptionem fieri captivorum, is qui specialiter designatus est legati vel fideicommissi habeat exigendi licentiam: et pro sua conscientia votum adimpleat testatoris: sin autem persona non designata, testator absolute tantummodo summam legati vel fideicommissi taxaverit, quæ debeat memoratæ causæ proficere, vir reverendissimus episcopus illius civitatis ex qua testator oritur, habeat facultatem exigendi quod hujus rei gratia fuerit derelictum, pium defuncti propositum, sine ulla cunctatione, ut convenit, impleturus. *L.* 28, § 1, *C. de episc. et cler.*

We see in the first of these texts, that, for want of a person who might oblige the testamentary heir to execute the will of the testator, the heir is left at liberty to do it or not, as he pleases; which shows the use and necessity of executors of testaments.

It may be remarked on the second of these texts, that a sum of money might be put into the hands of a legatee, that he might dispose thereof as executor of the will of the testator, which was known to him, *ut ministrum.*

As for the third text, it is necessary to see the sixth article and the remark upon it.

We see, in the 68th novel of the Emperor Leo, the use of executors of testaments: quibus testatores bona illorum existimatione moti, testamentarias de rebus suis præscriptiones committunt.

[The character of executor, as described in this article, is more applicable, with us in

III.

3335. *Execution of a Disposition committed to the Testamentary Heir, or to another Person.* — The testator who names several testamentary heirs, and who confides more in one of them than in the others, may charge him in particular with the execution of some dispositions of his testament, empowering him to take out of the estate the fund which may be necessary for the execution of the said dispositions: and he may likewise commit this care to a legatee, or appoint some other person for it, although he should give him nothing for his trouble, in consideration of the quality of the testator, and of that of the executor, or though he should leave him a legacy for his pains, as it is lawful for him to do.[e]

IV.

3336. *Security for Conditional Legacies.* — If among the legacies there were any of them conditional, whether it be that the execution of the testament were committed to one of the testamentary heirs, or to a particular executor of the testament, the fund for paying these conditional legacies would remain with the testamentary heirs,[f] they giving to the legatees security for their legacies according to the circumstances, as has been explained in its place.[g]

V.

3337. *Execution of Indefinite Dispositions.* — The execution of a testament consists not only in the payment of the legacies, and acquittance of the other charges, which are committed to the executor of the testament, according as they are regulated in the testament; but there may be some dispositions whereof the destination may depend on the will of the executor, or other person to whom the testator shall have referred it; as, for example, if he had

England, to what we call an overseer of a will, than to the executor. For some testators, having named executors of their wills, do also appoint some persons, whom they have a more special trust and confidence in, to be overseers of their wills, that is, to see to the due performance and execution of all the several dispositions in their wills. But although there should be no such overseers appointed, yet it is not much to be questioned, that due care will be taken to oblige the executors to a strict performance of all the dispositions in the will, by the persons who shall have an interest in the said dispositions, and who will have the aid of the law to compel the executors to perform the will of the deceased.]

[e] *L.* 107, *D. de legat.* 1; — *l.* 96, § 3, *eod.* See the texts cited on the foregoing article.

[f] See the seventeenth law, *D. de leg.* 2, cited on the second article.

[g] See the forty-sixth article of the eighth section, and the seventh article of the tenth section of *Legacies.*

left a sum of money to be distributed to poor families, or to redeem captives, or to be laid out on other charitable works, without determining any thing in particular, leaving it to the person whom he shall have named in his testament to apply the charity where he shall think it most proper.[h]

VI.

3338. *Execution of Dispositions which are neglected.* — If, the testator having named nobody for the execution of his testament, the testamentary heir should fail to acquit the charitable legacies left to some church or hospital, the officers of justice might take care to see the will of the deceased executed. But if the legacy were indefinite, such as that of a sum of money to be distributed to poor people, the testator leaving the disposal thereof to his testamentary heir, he could not be sued at law for legacies of this kind; for he may have acquitted them very honestly; and nothing would oblige him to give an account thereof, seeing the testator had excused him from doing it.[i]

VII.

3339. *The Executor is to give an Account.* — Seeing the executor of the testament is to discharge that function out of the stock of goods which shall be put into his hands either by the testamentary heir, or by decree of a court of justice, he is obliged to give an account how he has disposed of the goods which have been put into his hands, to produce acquittances of the legacies, and of the other charges, except as to what the testator had a mind to trust to his own integrity, as in the case of the fifth article; and he may likewise put down in his account the charges which he has been at in executing the testament.[k]

[h] See the twenty-eighth law, *Cod. de episc. et cler.*, cited on the second article. See the following article, and the remark upon it.

[i] *L.* 28, § 1, *C. de episc. et clerc.* According to the usage in France, it is the duty of the king's council at law to apply to the courts of justice for their assistance towards the execution of these sorts of dispositions, if they are neglected by the testamentary heirs and by the persons who ought to take care of the said dispositions, such as the governors and administrators of hospitals, the ecclesiastics who are intrusted with the administration of the goods belonging to the churches, and other persons who may have any interest in the said legacies.

[k] This is a consequence of the function of the executor of a testament.

TITLE II.

OF AN UNDUTIFUL TESTAMENT, AND OF DISHERISON.

3340. The liberty which the ancient Roman law gave to parents to disinherit their children without any cause, as has been observed in the preface to this second part,[a] was followed by so great a number of disherisons,[b] that it was found necessary to set bounds to it, by giving to the children who should pretend to be unjustly disinherited, whether by their fathers, or mothers, or other ascendants, the right of complaining of those dispositions which were called undutiful, because they were contrary to the duty of parents, which ties them to leave their goods to their children, who have done nothing to deserve the being deprived of them. And at last Justinian regulated by an express law the causes which might deserve disinheriting.

3341. They called the action which the law gave to children against the testaments in which they were disinherited the *Querela*, that is, the complaint of undutifulness; and it was permitted likewise to make such a complaint against excessive donations and marriage portions given to some of the children, or to other persons, if the said dispositions were undutiful, that is, if they did not leave to all the children their legitime, or child's part.

3342. Besides the disinheriting, which may be either just or unjust, there is another manner of depriving children of the inheritance, and that is by not naming them, or making no mention of them in the testament, which is called in the Roman law *preterition*, and is distinguished from an express disherison by this difference, that whereas a disherison may be just if there are just causes for it, preterition cannot but be unjust, there being no cause assigned.

3343. To soften what a complaint of undutifulness might contain in it that might be injurious to the memory of the testator, they gave to this complaint in the Roman law the pretext of a presumption that the testator had not the free use of his reason, and that it was for want of his right senses that he made such a disposition.[c] But in our usage we do not observe this precaution, and we charge the testator very freely with inhumanity, in-

[a] See the preface, no. 7. [b] *L.* 1, *D. de inoff. test.* [c] *L.* 2, *D. de inoff. test.*

justice, and hardship, or with having been influenced by passion, and the instigations of a mother-in-law, or of some other persons.

3344. The same equity which made the complaint of children to be received against the undutiful testaments of their parents, made likewise the complaints of fathers and mothers, and other ascendants, to be received against the testaments of their children, who deprived them of their successions without just cause, whether by expressly disinheriting them, or passing them by without taking any manner of notice of them in their testaments.

SECTION I.

OF THE PERSONS WHO MAY COMPLAIN OF A TESTAMENT, OR OTHER UNDUTIFUL DISPOSITION.

3345. We shall not insert in this section that law of the Romans which allowed bastard children to complain of the undutifulness of the testament of their mothers.[a] For in France bastards are incapable of all legal successions, as has been observed in its place.[b]

3346. It is to be remarked, that we ought not to reckon among the children who are allowed to complain of their not being inserted in the testaments of their fathers, and other ascendants, daughters who have renounced their right to the successions: for seeing they cannot succeed to one who dies intestate while there are male children, or any descended of males, there is no obligation to call them to the succession by testament.[c]

ART. I.

3347. *Children cannot be disinherited without a Just Cause.* — Testators who have children, or other descendants, whom the law calls to succeed to them if they die intestate, according to the rules which have been explained in their place,[a] cannot disinherit them, unless they have some one of the causes which shall be explained in this title.[b]

[a] *L.* 29, § 1, *D. de inoff. testam.*

[b] See the eighth article of the second section of *Heirs and Executors* in general.

[c] See the remark on the first article of the second section, *In what Manner Children succeed.*

[a] See the second section, *In what Manner Children succeed.*

[b] *Nov.* 1, *in præf.* § 2; — *l.* 1, *D. de inoff. testam.*; — *Nov.* 115, *c.* 3. See the first, second, and third articles of the second section.

II.

3348. *Neither Fathers, nor Mothers, nor other Ascendants.* — The testators who have no children, and who are survived by their fathers, or mothers, or other ascendants, cannot disinherit them, unless for some one of the causes which shall be likewise explained in this title.[c]

III.

3349. *Preterition of Children hath the same Effect as Disherison without Cause.* — If a father, or other ascendant, without expressly disinheriting one of his children, makes no mention of him in his testament; this silence, which is called *preterition*, is considered in the same manner as disherison which has no cause.[d]

IV.

3350. *And also the Preterition of Parents.* — The preterition of parents in the testaments of their children, to whom they have a right to succeed if they die intestate, if there are no descendants to exclude them from the succession, hath the same effect as the preterition of children in the testaments of their fathers. For although, by the order of nature, parents are not called to succeed to their children, and ought not to expect this sorrowful succession; yet it is just that, if, contrary to this order, the parents survive their children, they should not be deprived of their inheritance.[e]

V.

3351. *Parents cannot disinherit their Children, although they leave them their Child's Part by other Dispositions.* — Although a testator who has children leave them their legitime or child's part by some donation, legacy, or other disposition; yet he may not disin-

[c] Omnibus tam parentibus quam liberis de inofficioso licet disputare. *L.* 1, *D. de inoff. testam.* Nam etsi parentibus non debetur filiorum hæreditas, propter votum parentum, et naturalem erga filios caritatem; turbato tamen ordine mortalitatis, non minus parentibus quam liberis pie relinqui debet. *L.* 15, *D. de inoff. testam.*

Sancimus non licere liberis parentes suos præterire, aut quolibet modo a rebus propriis, in quibus habent testandi licentiam, eos omnino alienare: nisi causas quas enumeravimus in suis testamentis specialiter nominaverint. *Nov.* 115, *c.* 14. See the fourth article of the second section.

[d] Hujus verbi *de inofficioso testamento* vis illa est, docere immerentem se, et ideo indigne *præteritum*, vel etiam exhæreditatione summotum. *L.* 5, *D. de inoff. testam.*; — *l.* 3, *eod.*; — *Nov.* 115, *c.* 3. See the texts quoted on the first article.

[e] See the texts cited upon the first article, as also upon the third article.

herit them by his testament, or pass them by without taking any notice of them therein. But he ought to institute them heirs or executors in his testament, unless he mentions therein some just causes for disinheriting them.[f]

Remarks on the Preceding Article.

3352. It may be remarked on the text cited, that the interpreters, even the most skilful among them, have been of opinion that the meaning thereof is, that, to make the testament of a father valid, it is necessary that what he leaves to his children should be given them by way of institution; and that otherwise the testament in which their filial portion or child's part is left them without the quality of heir would be null. And this opinion is so universal, that it passes for a rule; although it be certain that the author of those extracts which are commonly called authentics, taken out of the novels of Justinian, and which are inserted in the places of the Code to which they have relation, seems not to have understood this text in that sense. For in the authentic *Non licet C. de lib. præter.*, which is taken from thence, he has made no mention of the necessity of leaving the filial portion to the children by way of institution: which he ought not to have failed to do, if it had been his own opinion; seeing in the authentic *Novissima C. de inoff. testam.*, taken out of the eighteenth novel, chap. 1, he had been careful to insert in it what was ordained by the said novel, that the filial portion might be left to them, not only by way of institution, but also by a bare legacy or a fiduciary bequest. *Sive quis illud institutionis modo, sive per legati, idem est dicere, et si per fideicommissi relinquat occasionem.* These are the terms of that eighteenth novel, which he has contracted in that authentic *Novissima*, in these words, *quoquo relicti titulo;* which is directly contrary to what this opinion will have to have been regulated by the hundred and fifteenth novel. So that this author having conceived in these terms the authentic *Novissima*, and having in the authentic *Non licet* made no mention of the necessity of this institution, it seems plain enough that he did not believe that this hun-

[f] Sancimus non licere penitus patri vel matri, aut avo vel aviæ, proavo vel proaviæ, suum filium vel filiam, vel cæteros liberos præterire aut exhæredes in suo facere testamento: nec si per quamlibet donationem, vel legatum, vel fideicommissum, vel alium quemcunque modum eis dederit legibus debitam portionem: nisi forsan probabuntur ingrati: et ipsas nominatim ingratitudinis causas parentes suo inseruerint testamento. *Nov.* 115, *c.* 3.

dred and fifteenth novel ought to be taken in this sense. And if we examine carefully the terms of this hundred and fifteenth novel, either in the original Greek or in the Latin, we shall not find that it is said there that the legitime or filial portion ought to be left by way of institution; but only that it is there said, that fathers and mothers, and other ascendants, cannot disinherit their children, nor pass them over in silence in their testaments, even although they had left them their filial portion by some donation, legacy, or fiduciary bequest, or in some other manner whatsoever, unless there were just causes for disinheriting them, and that the same were expressed in the testament. *Sancimus non licere liberos præterire, aut exhæredes in suo facere testamento; nec, si per quamlibet donationem, vel legatum, vel fideicommissum, vel alium quemcunque modum, eis dederit legibus debitam portionem: nisi forsan probabuntur ingrati, et ipsas nominatim ingratitudinis causas parentes suo inseruerint testamento.* Which words seem only to imply, that it is not lawful to disinherit children, or pass them over in silence in a testament, although by other dispositions, of what nature soever they may be, the parent had given them their filial portion, as by donations or codicils; and that, if after these dispositions a father or other ascendant makes a testament, he is obliged to make mention therein of his children, and cannot disinherit them without just cause. And to show that this sense is altogether natural, we might add, that seeing Justinian speaks in this place only of a testament which should contain a disherison or preterition of children, as appears evidently from the words which have been just now quoted, it seems to follow from thence, that, when he says that disinheriting was not allowed by a testament, although the children had their child's part left them by donations, legacies, or fiduciary bequests, he meant only other dispositions, and not the testament itself, in which he supposes them to be disinherited or omitted. For can any one say that a father who disinherits his son could ever think of leaving him his filial portion by a legacy or fiduciary bequest, in the same testament by which he disinherits him? And much less can this be said of a testament wherein the son is passed over in silence by a *preterition.* So that we may say that, Justinian having said that one cannot disinherit, nor pass over in silence, children in a testament, even although their filial portion had been left them by a donation, a legacy, or a fiduciary bequest, or in any other manner whatsoever, he did not mean that this other manner of giving the filial portion

should be in the testament itself by which the child is disinherited or omitted; but that he meant only to ordain thereby, that a father, or other ascendant, should not only not have power to disinherit his children without cause, but even not to pass them over in silence in a testament; and that such a testament should be null, although the testator had given to his children by some other title their child's part. But even although that other title should be a testament by which the children had been instituted heirs or executors, whether for their child's part or otherwise, that institution would not hinder the nullity of a second testament, in which they should be passed over in silence or disinherited; which is the subject-matter of Justinian's rule, explained in the words above cited, and which regard only the nullity of a preterition, or unjust disherison, and which he judges to be such independently of all other dispositions by which the legal portion due to the children may have been left them.

3353. We may likewise add on the same subject, that Justinian has been careful to observe, in several places, that he had not suffered any thing to be put into his code which was contrary to other dispositions therein contained; and that he has renewed the same observation on the matter concerning the successions of children in one of his novels,[a] where he proves that he has not abrogated a law of the Emperor Theodosius; and that it cannot be pretended to be contrary to one of his, for this reason, because that law of Theodosius is in his code. From whence one might gather, if this declaration of Justinian's were perfectly sure, that it was not his intention in this hundred and fifteenth novel to make it necessary that the children should be instituted heirs, in order to prevent a complaint of undutifulness; since, besides the eighteenth novel, we find in the code of this emperor many laws, and even some of his own, which forbid the complaint of undutifulness when the testator has left any thing to his children, by what title soever, whether of legacy or fiduciary bequest;[b] and which in this case give the children only a right to demand a supplement of the portion due to them by law.

3354. We have not made this remark in opposition to the ordinary sense every body gives to this hundred and fifteenth novel, nor to condemn the usage of this sense thereof, which has passed

[a] *Nov.* 158, *c.* 1.
[b] *Ll.* 29, 30, 31, 32, *C. de inoff. test.*; — *v. l.* 8, § 6, *D. eod.*

into a rule, since it may be said otherwise that this rule is altogether equitable, and that it is just that, the children being called by their birth to the inheritance of their parents, it should be left to them with the title of heirs, which nature and the laws give them. And this rule would be particularly just in the cases where parents should call to their succession other heirs together with the children. But if a father, having many children under age, had instituted for his universal heiress their mother, his wife, of whom there was no reason to fear that she would have other children by a second husband, and he had failed to make use of the name of heirs with relation to his children, fixing only their filial portion or child's part at certain sums; there would be some inconvenience in annulling a testament of this nature for that defect: as there would be likewise an inconvenience in annulling a testament wherein a father had made a partition of his goods among his children, without giving them in the testament the name of heirs, if no other fault were found in it. And seeing it happens often, in some provinces which are governed by the written law, that fathers make such dispositions for the good of their children who are under age, instituting their widows heiresses, and regulating at certain sums the portions due to their children by law, in order to avoid the charges and trouble of seals, inventories, and partitions, and upon other reasonable considerations, we have thought it proper to make this observation; and we have been likewise induced thereto by the fidelity that is due to the true sense of the laws.

VI.

3355. *Undutiful Testaments are annulled as to the Undutiful Institution.* — The testaments which are found to be undutiful, either because children or parents are omitted in it, or because they are unjustly disinherited, are annulled as to the undutiful institution.[5]

VII.

3356. *How the Complaint of Undutifulness passes to the Heirs of the Person disinherited.* — If the person who had a right to complain of an undutiful testament had children, and chanced to die before he had exercised his right, and made his demand; the chil-

[5] *L.* 8, § 16, *D. de inoff. testam.*; — *v. Nov.* 115, *c.* 3, *in f. et cap.* 4, *in f.* See hereafter the fifth article of the fourth section, and the sixteenth article of the fifth section of *Testaments.*

dren might complain of the said testament in the right of the deceased, unless he had approved the testament before his death.[h] But if there were other heirs, they could not exercise the complaint of undutifulness, unless the deceased had entered the complaint in his own lifetime.[i]

Remarks on the Preceding Article.

3357. It may be remarked on this article, that it follows from the first of the texts that are cited on it, that the children of the person disinherited are excluded as well as he from the inheritance, and that therefore, when a father disinherits his son who has children, the disherison which deprives the son of the goods of the testator cuts off likewise his children, and all that are descended of him, from having any share or benefit therein. For if it were the intention of the law to exclude from the succession only the person of the son disinherited, and not his children, and if they might succeed in their own right, in default of their father who is disinherited, it would not be necessary to give them the right of complaining of the undutifulness of the testament after the death of their father, unless it were only to vindicate the honor of his memory, which is not the case of this text; the sequel of which shows, that the son who is disinherited transmits to his children the same right which he had to complain of the testament. From whence it follows, that, the law giving this right to the children, it supposes that in their own persons they have to share in the inheritance from which their father has been excluded, unless they justify his memory, and get the disherison annulled. And although it be said in another law, that the son who is disinherited is considered as being dead, and that his children succeed in his place, *debent nepotes admitti nam exhæredatus pater eorum pro mortuo habetur*, *L.* 1, § 5, *D. de conjung. cum emanc. lib. ejus*, yet this text has relation to a sort of disinheriting which was frequent in the ancient Roman law, and had nothing odious in it, not being founded on the ingratitude of the children; but it turned sometimes to their advantage. *Multi non notæ causa exhæredant filios, nec ut eis obsint, sed ut eis consulant (ut puta impuberibus) eisque fideicommissam hæreditatem dant. L.* 18, *D. de liber. et post.* But the disherison which a son may have deserved by his bad conduct

[h] *L.* 34, *C. de inoff. testam.*; — *d. l. in f.*; — *l.* 6, § *ult. D. eod.*
[i] *L.* 36, *in f. C. eod.*

is a punishment which ought to extend to his children; for otherwise it would be useless, and would not even affect the son who is disinherited, since he would have by means of his children the use of the goods which he could not have himself.

VIII.

3358. *An Involuntary Preterition.* — If a father or mother, who had two or more children, having disposed of their goods among them by a testament, happened afterwards to have another child, of which no mention was made in the testament, and died without altering it; this testament would do no prejudice to the rights of the said child. For if it was through negligence that the said testament was not reformed, it would be an undutiful one: and if it was a pure effect of a sudden and unforeseen death; as if it was a mother who died in childbed of the said child, whose birth she perhaps waited for, in order to settle her will; the presumption that she could not have for the said child any other than the tender sentiments of a mother would supply the want of a testament, which this unforeseen accident had put her out of a condition to make. So that this child would still have the same portion of the inheritance which he ought to have had if there had been no testament at all.[l] But if the said father or mother, having no children at the time of making their testament, had instituted other heirs or executors, it would be annulled by the birth of this child, either as being an undutiful testament, or as being vacated by the said birth.[m]

IX.

3359. *If, of two or more Children, one alone is disinherited, without being particularly named, the Disherison is null.* — If a father, who had two or more children, having a mind to disinherit one of them, did express himself in such a manner as not to distinguish him from the other children, saying only that he disinherited his son, without specifying him by name, or describing him by some other mark; this disherison, which would not fall upon one son more than the others, would be without effect, even as to him whom it might be reasonable to presume that the father intended to deprive of his succession.[n]

[l] *L.* 3, *C. de inoff. test.*

[m] See the sixth article of the fifth section of *Testaments.*

[n] *L.* 2, *D. de lib. et post.*

X.

3360. *Provision for the Son who is disinherited, pending the Appeal from the Sentence given in his Favor.* — If, the son who is disinherited having procured the testament to be declared undutiful by a sentence, he who was instituted heir or executor therein had appealed from the sentence, and pending the appeal the son should demand a provision of alimony out of the estate; this provision would be decreed him according to the value of the estate and his quality.[o]

XI.

3361. *The Portion of a Child whose Disherison subsists accrues to the other Children.* — If, of two children whom a father had disinherited, one of them enters no complaint against it, he renouncing the inheritance for his part, or, having entered his complaint, he has been declared to be duly and justly disinherited, and the other disinherited child on his part gets the testament to be annulled, and comes in for his share of the inheritance with the other children; every one of them will have in the partition of the estate his portion, according to their number, without taking him in who is found to be justly disinherited, or who has renounced. For he having no share in the inheritance, the portion which he ought to have had remains in the mass of the estate, and accrues to him who was unjustly disinherited in conjunction with the other children. And if this child should happen to be the only one remaining, he would have the whole estate.[p]

XII.

3362. *Children to whom their Parents leave less than their Legitime or Child's Part have the Supplement of it.* — If the children have no other ground of complaint against the testaments of their parents, but that the portion left them therein is not so large as what they have a right to by law, or that the testator hath made his disposition which relates to them to depend on some condition or on a time which suspends the effect thereof; these would not

[o] *L.* 27, § 3, *D. de inoff. testam.*

[p] *L.* 17, *D. de inoff. test.*; — *v. l.* 16, *eod*; — *l.* 1, § 5, *D. de conjung. cum emanc. lib. ej.* If one of the sons disinherited had only delayed to bring his action, without approving of his being disinherited or renouncing the inheritance, his portion would not accrue to the other children by this silence. But the others might oblige him to explain himself; and it would be necessary to have the question about his disherison judicially discussed, in case he should not acquiesce under it. *V. l.* 8, § 8, *D. de inoffic. testam.*

be sufficient grounds for having the will declared void, on account of its being undutiful, but they could only demand the supplement of the portion due to them by law; and the conditions, or other causes of delay, would be without effect, so as that they might have their whole right at the time of the death by which they acquire it.[q]

XIII.

3363. *The Favor of the Person who is instituted Heir or Executor will not make the Disherison to subsist.* — Whatever may be urged, either on the score of piety, duty, or other consideration whatsoever, in favor of the disposition of a testator who had unjustly disinherited one of his sons, the testament would nevertheless be annulled. For the institution of children is the first duty of parents in their testaments.[r]

XIV.

3364. *Brothers and Sisters cannot complain of a Testament, as being Undutiful, unless the Person instituted Heir or Executor be an Infamous Person.* — Of all the persons whom the law calls to the successions of persons dying intestate, it is only those who are in the line of ascendants and descendants from the testator who may complain of the testament as being undutiful. And this right does not pass to any of the collaterals, not even to brothers and sisters: and they cannot complain of the testaments of their brothers or sisters who institute other heirs or executors, unless the institution were such as were contrary to good manners and decency, because of the quality of the person who is instituted heir or executor, as if it were an infamous person.[s]

[q] *L.* 32, *C. de inoff. testam.*; — *ll.* 29, 30, *et* 31, *eod.* See the fifth article, and the remark that is there made on it.

[r] Si imperator sit hæres institutus, posse inofficiosum dici testamentum, sæpissime rescriptum est. *L.* 8, § 2, *D. de inoff. testam.*

The case of this text appears to be so different from our usage, that we did not think it proper to give such an instance. For who with us, to make the disherison of his children to subsist, would ever think of instituting the king his heir? And yet this case must needs have been very frequent at Rome, seeing it is said in the text that it has been often decided, that although the prince were instituted heir by an undutiful testament, yet that should be no hindrance why a complaint against it, as being undutiful, should not be received.

[s] *L.* 1, *D. de inoff. test.*; — *l.* 21, *C. eod.*; — *l.* 27, *C. eod.* Justinian having abolished the difference between the *agnati* and *cognati* by his hundred and eighteenth novel, why should not the brothers by the mother's side have the same right as brothers by the father's

SECTION II.

OF THE CAUSES WHICH RENDER A DISHERISON JUST.

ART. I.

3365. *Children cannot be disinherited without a Just Cause.* — Seeing nature and the laws, which call children to the succession of their parents, look upon the goods of the parents as belonging already to the children, even in the lifetime of their parents; they cannot be deprived of them, if they have not deserved such a punishment, which, taking from them the goods, does at the same time stain their honor, and exposes them to yet greater evils. Thus, the laws have restrained the liberty of disinheriting, of which fathers might be apt to make a bad use,[a] either through an unjust passion, or by the impressions of a mother-in-law, or of other persons:[b] and they have regulated the causes which may deserve disinheriting.[c]

II.

3366. *Two Sorts of Causes of Disinheriting.* — The causes of disinheriting children may be distinguished into two sorts; one, of those which concern the person of the parents, as if a son has attempted any thing against the life of his father; and the other is of such as, without attempting any thing directly against the persons of the parents, may deserve their displeasure; as if a son engages himself in an infamous possession, as shall be mentioned in the following article. But although these causes be different, according to these two views, yet the laws give the name of causes of ingratitude to all those which may deserve disinheriting;[d] qualifying with this name every thing that is contrary to the duty which children owe to their parents. For this duty implies the abstaining from every thing that may justly draw upon the children the wrath of their fathers.

side? And would it not also be equitable, that the other near relations beyond the degree of brothers should have a right to annul an infamous institution, since it would be nevertheless contrary to decency and good manners, and against the spirit of the law, although the testator should have neither brothers nor sisters?

[a] *L.* 19, *in f. D. de liber. et post hæred. inst. vel exhæred.*; — *l.* 5, *D. de inoff. test.*

[b] *L.* 3, *eod.*; — *l.* 4, *eod.*; — *l.* 18, *C. eod.*

[c] See the articles which follow.

[d] *Nov.* 115, *c.* 3.

III.

3367. *Divers Causes of disinheriting Children.* — Fathers and mothers, and other ascendants, may disinherit their children, if they have attempted to take away their life, either by poison or by other ways;[e] if they have struck them,[f] or abused them, or committed any grievous offence against them;[g] if they have not relieved them out of prison, by engaging to present them in judgment, or to pay the debt for them, as far as their own circumstances will allow them;[h] if they have suffered them to remain in captivity, while they were able to redeem them;[i] if, the father having been mad, they have neglected to perform those offices towards him which that condition may have required;[l] if by any violence, or other unlawful way, they had hindered him from disposing of his estate by will; and if the father had died without being able to make his will, and to disinherit the son who had been guilty of this violence, this son would nevertheless be deprived of the inheritance;[m] if they have accused their parents of other crimes besides treason against the king or the state;[n] if a son has committed incest with his mother-in-law;[o] if he had contracted any familiarity with scelerates, and led the same kind of life with them;[p] if he had taken up an infamous profession, which his father did not follow;[q] if a daughter prefers an infamous life to a married state.[r]

[e] *Nov.* 115, *c.* 3, § 5. See on this article the third section of *Heirs and Executors* in general.

[f] Si quis parentibus suis manus intulerit. *D. c.* 3, § 1.

[g] Si gravem et inhonestam injuriam eis injecerit. *D. c.* § 2.

[h] Si quemlibet de prædictis parentibus inclusum esse contigerit, &c. *D. c.* § 8.

[i] Si unum de prædictis parentibus in captivitate detineri contigerit, &c. *D. c.* § 13.

[l] Si quis de predictis parentibus furiosus fuerit, &c. *D. c.* § 12.

[m] Si convictus fuerit aliquis liberorum ex eo quia prohibuerit parentes suos condere testamentum, &c. *D. c.* § 9. See the tenth article of the third section of *Heirs and Executors* in general.

[n] Si eos in criminalibus causis accusaverit, quæ non sunt adversus principem, sive rempublicam. *D. c.* § 3.

Si delator contra parentes filias extiterit, et per suam delationem gravia eos dispendia fecerit sustinere. *D. c.* § 7.

[o] Si novercæ suæ filius sese immiscuerit. *D. c.* § 6.

[p] Si cum maleficis hominibus ut maleficus versatur. *D. c.* § 4. It is in the Greek *μετὰ φαρμάκων*, cum veneficis. But whatever sense we give to this word, it would seem that this cause of disinheriting ought not to be confined to the frequenting of the company and imitating the example of one kind only of wicked persons.

[q] Si præter voluntatem parentum inter arenarios, vel mimos sese filius sociaverit; et in hac professione permanserit: nisi forsitan etiam parentes ejusdem professionis fuerint. *D. c.* § 10.

[r] Si aliqui ex prædictis parentibus volenti suæ filiæ, vel nepti maritum dare, et dotem

IV.

3368. *Divers Causes of disinheriting Parents.* — Children cannot disinherit their parents, except where they have a just cause for it; as, if they have attempted any thing against their life;[s] if they have put them in danger of losing it by some accusation, except it be in the case of treason, mentioned in the foregoing article;[t] if the father has been guilty of incest with the wife of his son;[u] if the parents have employed unlawful means to hinder their children from making their testaments;[x] if they have abandoned them in their madness,[y] or in their captivity;[z] and if the father or mother have attempted to take away the life or senses, the one of the other, by poison or otherwise, their common child may disinherit the author of such a crime.[a]

secundum vires substantiæ suæ pro ea præstare, illa non consenserit, sed luxuriosam degere vitam elegerit. *D. c.* § 11; — *v. l.* 19, *C. de inoff. test.*

We have not inserted in this article the last of the causes of disinheriting, which Justinian has collected in his hundred and fifteenth novel, which is that of heresy. For the usage of this cause having ceased for a long time in France, whilst the Protestants had the free exercise of their religion, it hath ceased in the present situation of affairs for the contrary reason, in that the late edict and declarations have taken away from them that liberty of conscience which they formerly enjoyed.

Although Justinian had restrained the causes for disinheriting children to those which we have just now explained, and had rejected all others, yet we have in France another cause of disinheriting brought into use by the ordinances, which have given permission to fathers to disinherit their children who marry against their consent, allowing only sons after they have accomplished thirty years of age, and daughters after they are past five-and-twenty, to marry themselves, after they have in a dutiful manner desired the counsel and advice of their fathers and mothers. Edict of *Henry* II., in the year 1556. Ordinance of *Blois*, art. 41. And might not there be other just causes of disinheriting? As, for instance, if a son had attempted to murder his mother-in-law, his father's wife? if on any occasion he had failed in any essential duty towards his parents, such as to furnish them with necessaries in their wants?

[s] Si venenis, aut maleficiis, aut alio modo parentes filiorum vitæ insidiati probabuntur. *Nov.* 115, *c.* 4, § 2.

[t] Si parentes ad interitum vitæ liberos suos tradiderint: citra tamen causam quæ ad majestatem pertinere cognoscitur. *D. c.* 4, § 1.

[u] Si pater nurui suæ sese immiscuerit. *D. c.* 4, § 3.

[x] Si parentes filios suos testamentum condere prohibuerint, in rebus in quibus habent testandi licentiam. *D. c.* § 4.

[y] Si liberis vel uno ex his in furore constituto, parentes eos curare neglexerint. *D. c.* 4, § 6.

[z] His casibus etiam cladem captivitatis adjungimus, &c. *D. c.* 4, § 7.

[a] Si contigerit autem virum uxori suæ ad interitum, aut alienationem mentis, dare venenum: aut uxorem marito, vel alio modo alterum vitæ alterius insidiari: tale quidem, utpote publicum crimen constitutum, secundum leges examinari, et vindictam legitimam promereri decernimus: liberis autem esse licentiam nihil in suis testamentis de facultatibus suis illi personæ relinquere quæ tale scelus noscitur commisisse. *D. c.* 4, § 5.

V.

3369. *The Causes of Disinheriting ought to be proved.* — It is not enough to justify the disinheriting, that the parents, or the children, mention the causes of it in their testaments; but the persons who are instituted heirs or executors ought to prove the facts upon which the disinheriting is grounded: and if they prove them not, it will be null.[b]

VI.

3370. *The Husband is not deprived of his Wife's Dowry, for the Ingratitude of his Wife towards the Parents who gave it.* — Although parents may deprive their ungrateful children of their estate, and even revoke donations which they may have made in their favor, as has been said in its place;[c] yet if a daughter who was endowed by her father or mother, or any other ascendant, had fallen into the crime of ingratitude, the marriage portion that was given or promised to the husband would nevertheless be due to him: for as to him the charges of the marriage, which he is bound to bear, are a just title for him to keep the said marriage portion, or to demand it, without any regard to the act of his wife.[d]

SECTION III.

OF OTHER CAUSES WHICH MAKE THE COMPLAINT AGAINST A TESTAMENT, AS BEING UNDUTIFUL, TO CEASE.

ART. I.

3371. *The Complaint against a Testament, as being Undutiful, ceases by the Approbation of the Testament.* — If the person who is disinherited, although without just cause, had once approved of the testament, the disherison would have its effect, whether it was by an express act that the testament had been approved, or by acts which did imply the said approbation, as shall be explained by the rules which follow.[a]

[b] By the ancient Roman law, the son who was disinherited, and who had a mind to bring his complaint, was obliged to make it appear that he was unjustly disinherited. *L.* 5, *D. de inoff. test.*; — *l.* 28, *C. de inoff. test.* But Justinian ordered that the causes of disinheriting should be proved, *nisi forsan probabuntur ingrati. Nov.* 115, *c.* 3. And it is also the general rule, that no accusation is regarded unless it be proved.

[c] See the second article of the section of *Donations.*

[d] *L.* 69, § 6, *D. de jure dot.*; — *v. l.* 24, *C. eod.*

[a] *L.* 31, *in f. D. de inoff. test.* See the following articles.

II.

3372. *If the Person disinherited, being a Legatee, receives the Legacy, he approves of the Disherison.* — If, in the same testament which contains the disherison, there were a legacy left to the person disinherited, as if a father, having disinherited his son, had left him a legacy, saying, that, although he were unworthy to have any share at all in his succession, yet he left him out of commiseration a certain sum, or a pension for alimony, and this son had received the legacy, he would thereby have approved the testament, and could not any more complain of his being disinherited. But if this son who is disinherited chanced to discover some flaw in the testament, that would be sufficient to annul it; as if it was forged, or null through some nullity which had been hid; the legacy which he had received would not bar him from the right of impugning such a testament.[b]

III.

3373. *What a Guardian does for his Minor ought not to hurt himself, nor what he does to himself to be of any Prejudice to his Minor.* — If it should happen that the person who is disinherited is guardian to one to whom the testator has left a legacy by the same testament which contains the disherison, and that, by virtue of his office of guardian, he had received the legacy left to his minor, this would not be an approbation of the testament with respect to himself; and what the interest of his minor had obliged him to do would be no hindrance to his bringing his complaint in his own name against the said testament, as being undutiful. And if, on the contrary, a father, having disinherited his son who is a minor, had by the same testament left a legacy to one who happens afterwards to be appointed guardian to the said son that is disinherited, the complaint which the function of this guardian would oblige him to enter against the said testament, as being undutiful, would not render him unworthy of this legacy. And likewise the demand of the legacy would not exclude him from bringing a complaint against the testament, as being undutiful, on the behalf of his minor, if it be well grounded.[c] And it would be the same thing if a guardian were bound, as such, to impeach the testament of the father of this minor, as being forged, if in the said testament,

[b] *L.* 10, § 1, *D. de inoff. test.*; — *l.* 5, *D. de his quæ ut indig. aufer.* See the seventh and eighth articles.

[c] § 4, *Inst. de inoff. testam.*; — § 5, *eod.*; — *l.* 22, *D. de his quæ ut ind.*

which by the event was declared to be genuine, there were a legacy left to the said guardian.[d] For in all these cases the guardian exercises the rights of two persons, who are distinguished in him, that of the guardian and that of his own; so that he does himself no prejudice by any thing which his duty of guardian requires of him.

IV.

3374. *He who approves of the Testament by any Act, is excluded from entering a Complaint against it as being Undutiful.* — If he who would complain of a disherison, or of some other undutiful disposition, had treated with the person instituted heir or executor, either for the whole inheritance, or a part of it; if he had bought any of the effects thereof from him, knowing him to be heir or executor; if he had hired of him some house belonging to the succession; if he had paid him a sum of money which he was indebted to the testator, or had received payment of a sum which the said executor, or a legatee, had been charged by the testator to pay to him: these kinds of acts, and others of the like nature, would be approbations of the testament, which would bar him from bringing a complaint against the same, as being undutiful.[e]

V.

3375. *This Complaint prescribes in Five Years' Time, if there be no Just Cause for the Delay.* — If the son that is disinherited, being of full age, had let five years pass without entering his complaint, after he knew he was disinherited, and, being present on the place, he had suffered the person who was instituted heir or executor, whether it was his brother or any other person, to continue in peaceable possession of the goods of which the disherison had stripped him, without being able to allege any excuse which had hindered him from bringing his action; this voluntary silence, being joined to the presumption that the disposition of his father was just, would make it be presumed, under these circumstances, that he had approved of it, and therefore his complaint ought not after that to be received.[f]

[d] *L.* 30, § 1, *eod.* See the fifth article of the second section of *Legacies*, and the seventh and eighth articles of this section. The said tutors would be very ill advised, if they should omit to make the protestations which are usually made in the like cases.

[e] *L.* 23, § 1, *D. de inoff. test.*; — *l.* 8, § 10, *eod.*; — *l.* 8, § 1, *C. eod.*

[f] *L.* 2, *C. in quib. caus. in integr. test. nec n. est*; — *l.* 14, *in f. C. de inoff. test.*; — *l.* 8, § *ult. D. eod.*

Remarks on the Preceding Article.

3376. Although this prescription of five years may seem to be too short a time to extinguish a demand of an inheritance, and an heir may bring his action for an inheritance at any time within thirty years, yet we ought to make a great difference between the silence of a disinherited son who forbears to commence his action under the circumstances explained in this article, and the silence of an heir who is not deprived of the inheritance by an act of disherison: for whereas he who is not disinherited has only the ordinary prescription to be afraid of, and his right remains entire whilst the time of that prescription is not expired; the son who is disinherited is excluded from the succession by an express title which deprives him of it, and makes it to pass to another. So that it is both his duty and his interest, and for his honor, to annul the said title, if it is possible for him: and if he lets the five years run, having no excuse to plead, it may be alleged against him, either that he has suffered this time to pass, that the proofs of the causes of the disherison might perish, or that his silence was only the effect of his consciousness that he was justly disinherited. It is because of these considerations that we have judged the rule of the Roman law, which makes the complaint against an undutiful testament to cease after five years' silence, when there appears no just cause for the delay, to be just and equitable, especially under the circumstances which we have added, and that thus our usage might approve of it.

VI.

3377. *If the Action of Complaint is let drop for Want of Prosecution, it is not afterwards received.* — If a son who is disinherited, having entered his complaint against the testament, lets his action drop for want of prosecuting it within the time limited by law, this silence, or non-prosecution of the suit, would be instead of an approbation of the testament, against which he had brought his complaint.[5]

VII.

3378. *The Complaint on the Score of Undutifulness does not exclude the Action on the Head of Forgery, nor the Action of Forgery the Complaint of Undutifulness.* — If he who is disinherited by a

[5] *L.* 8, § 1, *D. de inoff. test.*

testament which he pretends to be forged, having first entered his action on the score of forgery, had been cast in it; that would not bar him from bringing his complaint against the testament, as being undutiful. For although the testament were not forged, yet the disherison might be unjust. And if, on the contrary, having begun with his complaint against his being disinherited, he had been declared to have been duly disinherited, he might nevertheless impugn the testament, as being forged. For if the testament is forged, the disherison cannot subsist, even although it had been ratified in judgment.[h]

VIII.

3379. *One may plead the Nullities of the Testament, or the Undutifulness of it, successively one after the other.* — If he who had right to complain of a testament as being undutiful should likewise pretend that there were some nullity in the form of the testament, and that for the quicker despatch, and to avoid a suit about the undutifulness, he should desire that the question touching the nullity might be discussed in the first place, it would be just and equitable to begin first with that question; and if he should be cast in that, to admit him afterwards to his complaint against the testament, as being undutiful. Or if, having begun with this complaint, he had discovered afterwards some nullity in the testament, as if some of the witnesses were under some incapacities which had not been known, and which came afterwards to be discovered, it would be just to admit that allegation.[i] But if the circumstances do not require that these two causes should be divided, it would be proper to join them together in one and the same action.[k]

SECTION IV.

OF THE EFFECTS OF THE COMPLAINT AGAINST A TESTAMENT, AS BEING UNDUTIFUL.

ART. I.

3380. *If the Testator has left less than the Legitime or Portion due by Law, it ought to be made up.* — If the complaint of undutiful

[h] *L.* 14, *C. de inoff. test.*

[i] *L.* 16, *C de inoff. testam.*

[k] *L.* 8, § 12, *D. eod.* We have added these last words to the article, because it is our usage not to divide actions that may be joined in one.

fulness were against a testament in which no other wrong were done to the person who complains of it, except that he was thereby reduced to a portion less than what was due to him by law, without branding him with any accusation, the effect of the complaint would only be to procure him a supplement of his legitime, or portion due by law, such as it ought to be, according to the rules which shall be explained in the following title.[a]

II.

3381. *The Testament being declared Undutiful, all the Children succeed as if there had been no Testament at all.* — If the testament is declared to be undutiful, the institution of the heirs or executors whom the testator had put into the place of the complainant will be vacated, if the said heirs or executors were others than the children of the testator. And if they were his children, who ought to share the inheritance with him who was unjustly disinherited, their portions would be diminished, by taking from them, not barely the legitime or portion due by law to the person disinherited, but the entire portion which he would have had in the inheritance, if there had been no testament at all.[b]

III.

3382. *A Case where the Complaint of Undutifulness augments the Portion of the Son who is instituted.* — If a testator, having two sons, had instituted one of them his heir or executor for a less portion than that which would have come to his share if his father had died intestate; and, making no mention of the other son, or disinheriting him, had instituted a stranger his heir or executor for the surplus of his estate; the said institution being made void be-

[a] *L.* 32, *C. de inoff. test.*; — *l.* 30, *eod.* See the fifth article of the first section, and the remark upon it.

[b] Quantum ad institutionem hæredum pertinet, testamento evacuato, ad parentum hæreditatem liberos tamquam ab intestato ex æqua parte pervenire. *Nov.* 115, *c.* 3, *in f.*

It would seem as if this text related only to the nullity of the institution of heirs that were strangers, in the room of the children disinherited; and that, as the undutiful testament is annulled only as to what concerns the disinheriting, and that the legacies bequeathed therein do subsist, as shall be shown in the fifth article, if the testator, having disinherited only one of his children, had instituted his other children in unequal portions, it would seem not to be agreeable either to equity or to our usage, that the nullity of the disherison should render the condition of the children equal which the father had distinguished by his will. For which reason some have been of opinion, that this rule ought only to comprehend the bare nullity of the disherison. See the following article, and the remark made on it.

cause of the preterition or disherison, the complaint of undutifulness would have this effect, that the inheritance would be divided between the two sons, as if there had been no testament made. By which means it would happen that the son who was instituted, profiting by the complaint of the other son who was excluded, and thereby getting a moiety of the estate, would have more to his share than was left him by the testament.[c]

IV.

3383. *Extravagant Donations and Dowries are diminished to make up the Legitime, or Portions due by Law to Children or Parents.* — If a father, or other ascendant, had made donations either to some of his children, or to other persons, or settled dowries or marriage portions, so as to diminish his estate in such a manner as that there would not remain effects enough to satisfy the legitime, or portions due by law to the other children, reckoning into the estate the value of the things given away; these extravagant donations and dowries would be liable to be complained of, as being contrary to the duty of parents towards their children, were there a testament or not; and so much would be cut off from the said donations and dowries as would be necessary to make up the legal portions of the children, even although the donees, and the daughters who had been endowed, should be willing to abstain from the inheritance. And if, the donor having no children, his succession were to go to his father or other ascendants, they might demand in the same manner their legitime or legal portion of the inheritance out of the said excessive donations.[d]

V.

3384. *The Legacies of an Undutiful Testament subsist.* — The testament which is undutiful because of an unjust disherison, or a preterition, is made void only in so far as concerns the institution of another heir or executor in the place of him who is disinherited. Thus, when he who is instituted heir or executor is some

[c] *L.* 19, *D. de inoff. testam.* There is this difference between the case of this article and that of the remark which has been made on the foregoing article, that in this it is because of the exclusion of the stranger heir that the portion of the son who was not disinherited happens to be augmented.

[d] *V toto titulo Cod. de inoff. don.*; — *l. un. Cod. de inoff. dot.*; — *Nov.* 92. To avoid the length of many citations, we refer the reader to these titles, the substance of which is comprehended in this article. See the third article of the third section of the following title.

other person, and not one of the children, the institution remains without any effect at all: and if they be children who are instituted by the undutiful testament, their institution is reduced in such a manner, that he who was unjustly disinherited has as much as he would have had if there had been no testament at all, as has been said in the second article. But the legacies, the fiduciary bequests, and all the other dispositions of the undutiful testament, subsist, and have their effect, whether the person disinherited were a descendant or an ascendant,[e] as has been remarked in another place.[f]

Remarks on the Preceding Article.

3385. By the ancient Roman law the legacies of a testament which was declared to be undutiful, whether because of a disherison or preterition, were annulled as well as the institution, and that for this reason, because the testament was considered as having been made by a man out of his senses. *Filio præterito, qui fuit in patria potestate, neque libertates competunt, neque legata præstantur. L.* 17, *D. de injust. rup. irr. fact. test. Cum inofficio sum testamentum arguitur, nihil ex eo testamento valet. L.* 28, *D. de inoff. testam.* And if the legacies had been paid, the legatees were bound to restore them. *Nec legata debentur, sed soluta repetuntur. L.* 8, § *pen. eod.* This rule had its justice, supposing a disherison or preterition to be altogether unjust. But seeing it is very rare, and hard to be imagined, that parents will be moved to disinherit their children, or children their parents, without great cause; it has been thought equitable on this consideration to ratify and confirm the legacies and other dispositions of testaments which contain disherisons that are annulled. And although it does happen from hence that the condition of the legatees proves to be more favorable than that of the person who is instituted heir or executor, whom the testator, nevertheless, valued more than the

[e] Si vero contigerit in quibusdam talibus testamentis quædam legata, vel fideicommissa, aut libertates, aut tutorum dationes relinqui, vel quælibet alia capitula concessa legibus nominari, ea omnia jubemus adimpleri, et dari illis quibus fuerint derelicta, et tanquam in hoc non recissum obtineat testamentum. *Nov.* 115, *cap* 3, *in fine.*

This text relates to the testaments of children, and the same thing is ordained at the end of the following chapter with respect to the testaments of parents.

Si quid autem pro legatis, sive fideicommissis, et libertatibus, et tutorum dationibus, aut quibuslibet aliis capitulis, in aliis legibus inventum fuerit huic constitutioni contrarium, hoc nullo modo volumus obtinere. *D. Nov. cap.* 4, *in fine.*

[f] See the sixteenth article of the fifth section of *Testaments.*

legatees, as it may fall out on other occasions, as has been already remarked in another place;* yet this event in such a case would cause no inconvenience. For the condition of an heir or executor, who possessed unjustly the place of the person disinherited, and who perhaps contributed to the getting him disinherited, ought not to be so favorable as that of the legatees, seeing the dispositions in which they are concerned do not the same injury to the person disinherited.

TITLE III.

OF THE LEGITIME, OR LEGAL PORTION DUE TO CHILDREN OR PARENTS.

3386. We have seen in the foregoing title, that parents ought to leave to their children, and children to their parents, a certain portion of their estate. It is this portion that is called the *legitime*, or *legal portion*, which shall be the subject-matter of this title.

3387. The legal portion of children was, by the ancient Roman law, only a fourth part of the portion which they would have had if the parent had died intestate.[a] Thus, an only son had for his legal portion the fourth part of the whole estate; and if there were two sons, they had each of them the fourth part of one half of the estate, that is to say, an eighth part of the whole; and so in proportion, according to their number.

3388. This legal portion was fixed to this small proportion of the estate at a time when they began to set some bounds to the liberty that every one had to dispose of his goods as he thought best,[b] and even to deprive his children of them. And whereas it seems natural that the children should have either the whole estate, or the greatest part of it, and that the liberty of bequeathing should be limited to some small portion of the estate, as it is regulated by our customs; the Romans left the greatest share of the

* See the fifth article of the seventh section of *Testaments*, and the remark made there upon it.

[a] Quarta debitæ portionis. *L.* 8, § 8, *D. de inoff. test.*

[b] Uti quisque legassit de re sua ita jus esto. *Inst. de lege Falc. ex l.* 12 *tabb.*; — *Nov.* 22, *cap.* 2.

estate to the free disposal of the testators, and restrained the right of the children to a small portion. So that what is said of legacies in a law, which calls them a small diminution of the inheritance, which ought to belong wholly to the heir or executor,[c] would be more applicable to this legal portion of the children, which is in effect only a small retrenchment of the inheritance, the whole of which may be left to one sole legatee, of whom one would be very much in the wrong to say that his legacy were only a small diminution of the inheritance.

3389. Justinian was sensible that this portion allotted to the children by law was not sufficient, and he augmented it, but with moderation, distinguishing the legal portion according to the number of the children, and giving to them all, if they were four in number, or under, a third part of the whole estate, and the half of the estate if the children were five or more in number: so that this third, or this half, is equally divided among the children, and the two thirds, or the other half, remain for the legacies. Thus, what number soever there be of children, the legal portions of them all together, when they are reduced to it, are at most but equal to the share of the legatees; and if the children be fewer in number than five, the legatees have double the portion which is reserved by law for the children.

3390. Our customs in France have almost all of them distinguished between the several sorts of estates and goods, between estates of inheritance and estates of purchase, between goods movable and immovable; and according to these different sorts of estates and goods, they have regulated differently the liberty of testators, not only with respect to the children, but even in favor of the heirs of blood the most remote, whom they can only deprive of a certain portion of estates of inheritance. And some customs have made no manner of distinction of goods, but have restrained the liberty of disposing by testament to a small portion, such as one fourth part of all the goods in general, and reserved three fourth parts of the whole to the heirs of blood, whether they be children or others. Thus, these customs give a great deal more to the most distant relations than they allow to be given to legatees; and the portion of the estate which they appropriate to the heirs of blood, and which they cannot be deprived of by a testament, is much greater than the legitime, or legal portion, of the children in the provinces which are governed by the written law.

[c] *L.* 116, *D. de legat.* 1.

3391. It is not our business to examine here which of these two laws is most just and equitable, whether the Roman law or the law of our customs:[d] both the one and the other may be useful in their different ways. For if on one hand it be just that estates should be appropriated to the families, and that the great liberty that is taken in making dispositions, very often unjust, should not strip the children and the other heirs of blood; so on the other hand it may be of service if the said heirs, and especially the children who are incapable of being wrought upon by better motives, be kept to their duty out of fear of seeing themselves reduced to a very small portion reserved to them by the law.

3392. All the rules relating to this matter of the legitime, or legal portion, respect either the persons to whom a portion is due by law, or the quantity of the said portion, or the goods out of which it is taken, and the manner in which it is regulated; which shall be the subject-matter of three sections.

SECTION I.

OF THE NATURE OF THE LEGITIME, OR LEGAL PORTION, AND TO WHOM IT IS DUE.

3393. It is necessary to make the same remark here, as has been made in the foregoing title, that we are to except out of the number of children to whom a legitime, or legal portion, is due, daughters who by their contract of marriage have renounced their right and pretensions to their parents' inheritance, in consideration of a marriage portion. For although this marriage portion may prove to be less than the legitime which would accrue to them by law out of the goods of their fathers who have endowed them; yet the uncertainty of the events which may diminish the said goods is one of the motives which justify the renunciation of a future and uncertain profit, for a certain and present portion.[a]

3394. We must likewise take notice, in relation to this matter of the legitime, of the regulation that was made for the legitime of mothers out of the successions of their children, by that ordinance which is called the edict of mothers, of which mention has been

[d] See what has been said on this subject in the preface to this second part, no. 7.

[a] See, concerning these renunciations, what has been said in the preamble to the second section of *Heirs and Executors* in general.

made in the preamble of the first section, *In what Manner Fathers and Mothers succeed.*

ART. I.

3395. *Definition of the Legitime.* — The legitime, or legal portion, is a certain share of the inheritance which the laws appropriate to those persons who cannot be deprived of the quality of heir, and to whom they give a right to complain of undutiful wills. And this has occasioned the liberty of devising by will to their prejudice to be restrained, so as that there may remain for them a share of the inheritance, of which they cannot be deprived by any disposition.[a]

II.

3396. *The Legitime is due to Descendants and Ascendants.* — There are two orders of persons to whom the laws give a legitime, to children out of the estates of their parents, and to parents out of the estates of their children. But if in the same succession there are both children of the deceased and also parents, there will be only a legitime for the children: for they exclude the parents from successions.[b]

III.

3397. *All Children who are capable of inheriting have a Right to a Legitime.* — All the children of both sexes have, without distinction, the right to demand a legitime, or legal portion, whether they be in the first degree of sons or daughters, or whether they be descended one or more degrees lower, provided only that they be called to the inheritance, whether it be in their own name, or by representation, as has been explained in its proper place.[c]

IV.

3398. *The Legitime of the Children of the First Degree is regulated according to their Number.* — When there are only children of the first degree, they have each of them their legitime by equal shares. And if there are at the same time children of the first de-

[a] *L.* 8, § 11, *D. de inoff. test.*; — *l.* 5, *C. de inoff. don.*; — *Nov.* 18, *cap.* 1, *in f.* See the following article.

[b] See the articles which follow, and the first title of the second book.

[c] Children are called to the legitime in the same order as to the succession of one who dies intestate, according to their rank, explained in the second book, title 1, section 2.

gree alive, and grandchildren descended from others deceased, the succession is divided according to the number of the children of the first degree who are still alive, and of those who, being dead, have left children who represent them; and these grandchildren have only among them the legal portion which the person whom they represent would have had: for it is that legal portion which falls to their share.[d]

V.

3399. *And that of Children of Remoter Degrees is regulated by their Stocks of whom they are descended.* — If there were no child of the first degree alive, but several grandchildren of the second degree, or other degree more remote, they would have all of them their legal portions, not according to their number, but the descendants of each son would have among them the legitime which their father would have had. And every one of these descendants would have their share in the said legitime, greater or lesser, according as they are more or fewer in number.[e]

VI.

3400. *Among Ascendants the Legitime is due only to the nearest.* — The second order of persons to whom a legitime, or legal portion, is due, is that of parents, that is, of fathers and mothers, and other ascendants.[f] But there is this difference between them and children, as to what concerns the legitime, that seeing the nearest ascendants exclude the remotest from the successions of descendants, and that in the order of ascendants there is no right of representation, as there is in the order of descendants, it is only the nearest ascendants to whom a legitime is due.[g]

VII.

3401. *If the Ascendants are many in the same Degree, one Half of the Legitime goes to those of the Father's Side, and the other Half to those of the Mother's Side.* — If the nearest ascendants

[d] This is a consequence of the foregoing article, and of the order of the succession of children.

[e] This is a consequence of the same order.

[f] *Nov* 1, *in præf.* § 2.

[g] See the second book, title 2, section 1, article 5. We must take this article in the same sense as what has been said of the succession of ascendants, so as that they may preserve the right of reversion of estates that are subject to it. See the third section of the same second title.

happen to be many in the same degree, some paternal and some maternal, the total of their legitime will be divided, not by the head, according to their number, but in two parts, one for the ascendants of the father's side, and the other for the ascendants of the mother's side; although the number of those of one side be greater than the number of those of the other. And if there be ascendants only of one side in the same degree, their legitime is divided by heads.[h]

VIII.

3402. *Brothers have no Legitime.* — Although brothers may complain of an undutiful testament of their brother, in the case of the last article of the first section of the foregoing title, yet they have not for all that a right to a legitime. For in that case it is the whole inheritance that the law gives them, and in all other cases they may be deprived by testament of all share in the inheritance.[i]

SECTION II.

WHAT IS THE QUOTA OR QUANTITY OF THE LEGITIME, OR LEGAL PORTION.

ART. I.

3403. *Different Quotas of the Legitime.* — The *quota* of the legitime is the portion of the whole goods of the inheritance, which is appropriated to him to whom a legitime is due. And the said portion is differently regulated, as shall be explained by the following articles.[a]

II.

3404. *The Legitime of Children differs according to their Number.* — With respect to children, the law hath differently regulated their legitime, according to their number,[b] by the rules which follow.

[h] See the second book, title 2, sect. 1, art. 6.
[i] See the last article of the first section of the preceding title.
[a] Substantiæ pars. *Nov.* 18, *cap.* 1. Definita mensura. *D. c.*
[b] See the following articles.

III.

3405. *If there be Four Children, or under that Number, they have a Third Part of the Estate.* — If there are four children, or a lesser number, they have all of them together for their legitime a third part of the estate; so that this third remains entire to one only child, if there be no more than one, or is divided among them all, according to their number, each of them having for his legitime his share of this third part.[c]

IV.

3406. *If there be Five or more Children, they have a Moiety of the Estate.* — If there are five children, or a greater number, they have all of them among them for their legitime the half of the estate; so as that the said half be divided among them all according to their number, each of them having for his legitime his share of the said moiety; and that it remain entire to one only child, if there is but one.[d]

V.

3407. *Those who come by Representation have only one Share among them.* — We must understand the two preceding articles in the sense explained in the third, fourth, and fifth articles of the first section; so as that the children who come by representation, of what number soever they consist, may have among them only the share of the person whom they have right to represent.[e]

VI.

3408. *The Legitime of the Ascendants is the Third Part of the Estate.* — Seeing the legitime, or legal portion, of the ascendants is not more favorable than that of the children, and that there is for the legitime of an only child, and even of four children, but a third part of the estate, there is likewise only a third part for the ascendants, to be divided among them, if they are more in number than one.[f]

Remarks on the Preceding Articles.

3409. It is certain that a legitime is due to ascendants, seeing the law gives them a right to complain of the undutifulness of

[c] *Nov.* 18, *c.* 1.
[d] *Nov.* 18, *c.* 1.
[e] See the said articles, and the second book, tit. 1, sect. 2.
[f] *Nov.* 18, *cap.* 1, *in fine.*

their children's testaments, which it would not give them if it did not appropriate to them a part of the inheritance, which cannot be taken away from them. But when Justinian regulated the legal portions by his eighteenth novel, the texts whereof have been cited on the preceding articles, he confined himself to the legitime of children, and did not expressly regulate that of parents. So that it has been doubted whether the legitime of parents ought to be the same with that which has been settled for the children. And seeing, by this regulation of Justinian, the legitime of the children has been diversified according to their number, having been fixed to a third part of the inheritance when there are only four children, or a lesser number, and to the moiety when there are five children, or upwards, as has been said in the third and fourth articles; there was ground to doubt whether, after this regulation, the ascendants ought to have either a third, or a moiety, or only the ancient legitime, which was the fourth part of what would have fallen to them had the party died intestate, as has been said in the preamble of this title. This question has been decided by usage, and by the opinions of interpreters, who have judged that the legitime of parents ought to be a third part of the inheritance. And this opinion may be grounded on the last words of that eighteenth novel of Justinian; for after having there regulated the legitime of children, he says that the same thing shall be observed with respect to all persons to whom the ancient law gave the right to complain of a testament as undutiful, and a fourth part of the inheritance for their legitime. *Hoc observando in omnibus personis in quibus ab initio antiquæ quartæ ratio de inofficioso lege decreta est.* These words, which are the same that have been quoted on this article, seem to comprehend clearly enough the ascendants, and can be understood only of one legitime, without distinction of their number, since we ought not to suppose that there are more than four ascendants concurring together to the succession. Thus, it would seem reasonable on that account, that their legitime should be regulated to a third part at least. To which we may add, that Justinian, speaking of the legitime due to parents in the eighty-ninth novel, chap. 12, § 3, says there, that he has already fixed the said legitime. *Si vero habuerint hi quos prædiximus aliquos ascendentium, legitimam eis relinquant partem quam lex et nos constituimus.* Which can be applied to nothing else but to the regulation in his eighteenth novel.

3410. This first question concerning the legitime of ascendants

has been followed by another, which has divided the same interpreters into two parties. It is in the case of a testator, who, having no children, leaves behind him one ascendant, and brothers of the whole blood, and institutes either his brothers or strangers his heirs or executors, leaving to the ascendant only a small portion of the inheritance, such as does not satisfy him; whether, in this case, the ascendant's legitime be a third part of the whole estate, or only a third of the portion which the said ascendant would have had if there had been no testament, the brothers concurring with him.

3411. Of these two parties, one pretends that the legitime of parents is always the same, namely, a third part of the estate: and the others will have the legitime in this case to be only a third of the share that the ascendant would have had, if there had been no testament. So that if, for example, there were two brothers, as the ascendant's portion, if there were no testament, would be a third, as has been shown in its place,* his legitime ought to be a third of that third; and this is their reason, which has given rise to this question. They establish for a principle and general rule in the matter of the legitime, or legal portion, that every legitime is nothing else but a portion of that share of the inheritance which would have accrued to him who demands his legitime, in case there had been no testament. From whence they infer, that when the deceased leaves behind him brothers by the same father and mother, the legitime of the ascendant is diminished according to their number; since, when there is no testament, the hundred and eighteenth novel, chap. 2, calls to the succession the brothers of the whole blood, together with the ascendants, by equal portions. From whence it follows, according to their principle, that the legitime of an ascendant, when the deceased leaves behind him brothers, is only a third part of the share which he would have had in conjunction with the brothers, if the deceased had died intestate. So that if there were, for instance, seven brothers, the legitime of the ascendant, who would have had, if there had been no testament, only an eighth part of the inheritance, would be only a four-and-twentieth part. And to this reason they add, that, if the legitime of the ascendants were always a third part of the whole estate, it would fall out that their legitime might be much greater than the portion which would have fallen to their share if there

* See the seventh article of the first section of the second title of the second book.

had been no testament: since, in this very case of the seven brothers, the portion that would fall to them, in case there were no testament, would be only an eighth part, and yet, nevertheless, their legitime would be a third; which, they say, would be a great inconvenience.

3412. The others, on the contrary, have been of opinion, that the legitime of ascendants, in all cases where it ought to take place, is always a third of the inheritance to be divided among all the ascendants, as that of the children is always either a third or a half, according to their number, to be shared among them. Which is founded on the remarks that have been just now made, and on this, that the rule of the ancient Roman law, which fixed the legitime at a fourth part of the portion that would be due if there were no testament, has been altered by Justinian, who has regulated the legitime, not at a portion of the share that would fall to them if there were no testament, but at a certain portion of the total of the inheritance, to wit, a third, or a moiety. Thus, the legitime is independent of the portion, greater or less, which one might have in case there were no testament. To which they add, that, the brothers having no legitime reserved to them by law, they cannot come in for any share of the legitime of the ascendants to diminish it.

3413. One sees that these difficulties are a consequence of the law of Justinian, which has called the brothers of the whole blood to the succession with the ascendants, when there is no testament. For if the brothers of the whole blood did not concur in the succession with the ascendants, no more than the brothers by the mother's side only, there would never have been any doubt concerning the manner of regulating this legitime of the ascendants. From whence it seems reasonable to conclude, that seeing the whole difficulty proceeds barely from the novelty of that law which diminishes the portion of ascendants succeeding to one who dies intestate, when there are brothers, and that there is no proof that Justinian intended by that law to lessen the legitime of ascendants, nor to render it uncertain, according as the brothers should be in a greater or lesser number, those of the second party may agree, without any prejudice to their cause, that the legitime ought to be a portion of that share which one would have if the deceased had died intestate; adding to it what seems to be agreeable to reason and justice, to wit, that this rule ought to be understood of the portion which he who demands the legitime would

have, in case he succeeded alone to the person dying intestate, or that nobody concurred in the succession with him, except persons to whom a legitime would be likewise due. For in this sense it will always hold true, according to the ancient law, that the legitime will be a portion of what one would have if the deceased had died intestate, as may be seen in the legitime of children regulated by Justinian; since it is certain that the third or half of the estate which he gives to the children makes a third or half of the succession, which they would have entire if there were no disposition that curtailed them of it.

3414. The other difficulty then that remains is to know whether Justinian, when he granted the favor to brothers of the whole blood to call them to the succession with the ascendants, intended thereby to make such a confusion as to overturn the order and the principles of the legitime, or legal portions, and to make a rule which, without being anyways explained, should have this effect, that a testator, leaving behind him a father and eleven brothers, might give to his father only a six-and-thirtieth part of his estate, and nothing at all to his brothers, leaving the five-and-thirty portions to a stranger. Nothing obliges us to judge that Justinian's law, which calls the brothers together with the ascendants to the inheritance of their brothers, ought to make such a change in the legitime of the ascendants; but this law is limited to the successions of those who die intestate. And although it may happen by this law, that the legitime of an ascendant may be much greater than the portion he would have had in the inheritance if the deceased had died intestate, yet this is no greater inconvenience than that which happens with respect to the legitime of children, that when they are only four in number, their legitime, which ought to be greater than if they were five in number, is nevertheless smaller. For in this case every one of the four children has only a fourth part of a third, which is only a twelfth part; whereas among five children, each of them has a fifth part of a moiety, which makes a tenth part of the whole. These kinds of consequences are natural to arbitrary laws, as has been observed in other places, and are not such inconveniences as ought to make any change in them.

3415. It seems reasonable to conclude from all these reflections, and from the words of the eighteenth novel quoted upon this article, that Justinian has fixed the same legitime for ascendants as for children, when they have a third; and that this legitime of the ascendants is always the same, whether there be brothers, who

concur with them in the succession, or whether there be none. And this rule can be attended with no inconvenience, whatever case may happen. For if we suppose that a son institutes his father or his mother, and his brothers of the whole blood, his heirs or executors by equal portions, the father and mother could not complain of a testament which gives them all they would have had by law, had there been no testament. But if this son had instituted a stranger his heir or executor, together with his father, leaving his father not so much as what the law allots him, it would be for the interest of the brothers that the father should have a third part, seeing this third would come to them after the father's death. And, in fine, if the brothers were instituted with the father or mother, but by unequal portions, so as that the father or mother should have less than some of the brothers, it would not be just, nay, it would be a hardship in the brothers, to reduce their father or mother to a third part of the portion which each of them would have if there were no testament.

SECTION III.

OUT OF WHAT GOODS THE LEGITIME IS TAKEN, AND HOW IT IS REGULATED.

ART. I.

3416. *The Legitime is regulated according to the Value of the Goods.* — Seeing the legitime is a portion of the inheritance, it is out of all the goods in gross that it ought to be taken,[a] not by dividing each land or tenement, each right, or other goods, separately by themselves, in order to give a part of every one thereof to him to whom a legitime is due; but by estimating the whole effects belonging to the inheritance, and so to give him his share of the said effects, to the value of his portion.

II.

3417. *The Demand of the Legitime is a Demand of a Partition.* — If he to whom a legitime is due insists on having his share of the inheritance, not in value, but in hereditary effects, the heir or executor cannot refuse it. And if they do not agree among them-

[a] Tertia propriæ substantiæ pars. *Nov.* 18, *c.* 1.

selves, it is necessary to make a partition, and to give for the legitime goods of the inheritance which may make it up. For the legitime being a part of the inheritance, the demand of a legitime is in effect a demand of a partition;[b] which ought to be made according to the rules explained in their place.[c]

III.

3418. *Goods given away in the Testator's Lifetime are subject to the Legitime.* — Seeing the securing of a legitime to the persons to whom it is due is to hinder any dispositions that might diminish their share in the estate of him who ought to leave this legitime, it must be taken, not only out of the goods which he has left behind him, but also out of the goods which he may have disposed of by donations made in his lifetime to his children, or to other persons, or by marriage portions to daughters; for otherwise these kinds of dispositions might quite destroy a legitime. Thus, it is taken out of the goods alienated in this manner, as well as out of those which remain in the inheritance.[d]

IV.

3419. *The Children who are Donees may abstain from the Inheritance, but their Donations are subject to the Legitime.* — If the children to whom the parents had made donations, or given marriage portions, to the prejudice of the other children, should pretend to content themselves with what had been already given them, and offer to renounce their share in the inheritance; they might very well abstain from taking upon them the quality of heirs, and by that means free themselves from the charges of the succession; but their donations would be liable to be diminished in order to make up the legitime of the other children.[e]

V.

3420. *Dowries and Gifts are reckoned as a Part of the Legitime.* — All the kinds of goods which may be liable to be brought into hotch-pot in case of a partition, such as the donations mentioned in the foregoing article, and those which may have been made to the same persons who demand a legitime, enter into the mass of

[b] *L.* 36, *C. de inoff. test.*

[c] See the title of *Partitions.*

[d] *L.* 1, *C. de inoff. donat.*; — *v. tot. h. tit. et l. un. C. de inoff. dot.*; — *Nov.* 92. See the fourth article of the fourth section of the foregoing title.

[e] *Nov.* 92.

the goods from whence the legitime is to be taken, and contribute towards it. Thus, when the legitime is due to him who ought to bring in goods to the mass of the inheritance in case of a partition, he ought to reckon what he has received as a part of his legitime; and what may be wanting to make it up is either taken from the others, or out of the bulk of the inheritance. And if he who demands the legitime has received nothing, he takes it out of the whole inheritance: and the donees who have received too much ought to contribute to it in proportion.[f]

VI.

3421. *The Fruits of the Legitime are due from the Time the Succession is open.* — Seeing the legitime is due at the moment that the succession is open, the fruits and other revenues of it are likewise due from the said moment; and the testator cannot hinder it by any disposition.[g]

VII.

3422. *The Legitime cannot be subject to any Charge, Delay, or Condition.* — If the testator had made some disposition which he intended should be in lieu of the legitime of one of his children, and having settled it either at a certain sum, or in some particular goods, or even at a certain portion of the inheritance, he had added thereto some condition, or some delay for the delivery or payment of what he had left, or some other charge; these conditions, these delays, these charges, would be without effect, if what he had given did not exceed the value of the legitime. For as it is nothing else but a certain portion of the inheritance which cannot be diminished by the testator, he can neither charge it with any burden, nor retard the payment or delivery of a thing which ought to go to his children at the time of his death, and that without any diminution.[h]

VIII.

3423. *The Legitime of Children of different Marriages is not distinguished.* — If there are two or more children of the same father or mother by different marriages, their legitimes will not be distinguished by the difference of those marriages; but all the

[f] *L.* 29, *in f. C. de inoff. test.* See the title of the *Contribution of Goods.*
[g] *Nov.* 18, *c.* 3.
[h] *L.* 32, *C. de inoff. test.*

children of the same father, or of the same mother, although by different marriages, will have each of them their legitime, according as the number of them all together shall demand.[i]

TITLE IV.

OF THE DISPOSITIONS OF THOSE WHO HAVE MARRIED A SECOND TIME.

3424. Every body is sensible of two truths in relation to second marriages, and both the one and the other are equally agreeable to religion and to nature. One is, that second marriages are not unlawful; and even the church condemns those who esteem them such.[a] And the other is, that the liberty of marrying a second time, howsoever lawful it may be even for such as have children by a former marriage, is nevertheless attended with some mark of distinction, by which the laws of the church and of the state distinguish the condition of those who marry again from that of persons who have not taken the same liberty. As to the church, the canon law forbids the receiving into holy orders those who have been twice married.[b] And it makes likewise some other distinctions of second marriages, which are sufficiently known, and which it is not our business to speak of here. As to the laws of the state, they have set bounds to the dispositions which persons who, having children, do marry a second time, may make of their estates.

3425. The motives of these laws of the church and of the state, in relation to second marriages, are different according to their different views. For the church considers in them a kind of incontinency, which it tolerates, but which makes the persons appear in her eyes less pure, and by that means less fit to exercise those sacred functions of which the holiest persons ought to account themselves unworthy. And the laws of the state consider in second marriages the inconvenience of the wrong which persons who marry again do to their children. And to prevent the

[i] *Nov.* 22. *c. ult.*

[a] 31, *q.* 1, *c.* 11, 12, 13.

[b] 1 *Tim.* 3, 2; —*dist.* 26, *et tit. de bigam. non ordin.*; —*v. Nov.* 6, *c.* 5.

dispositions which parents, whose affection for their children may be alienated by a second marriage, might make to their prejudice, the laws have appropriated to the children the goods which came from their fathers or mothers to the survivor of the two who marries again. They have likewise restrained the dispositions which the survivor who marries again might make of his or her own proper goods in favor of the second husband, if it is the mother, or of the second wife, if it is the father who has married again. And they have given the name of punishment of second marriages to that which they have ordained on this subject in favor of the children of those persons who marry again.[c]

3426. It is these rules which restrain in favor of the children the dispositions of fathers and mothers who marry again, that we are to treat of under this title, and which our usage has taken from the Roman law. For even that ordinance which is called the edict of second marriages, made by Francis II. in the year 1560, hath been taken from thence, as we shall observe on the articles of this title which have relation to those of the said ordinance.

3427. By second marriages, whether it be that of the husband or of the wife, is understood every marriage which is not the first; and whatever number of marriages there may have been, they are all comprehended under this name of second marriages, with respect to that party of the married couple who had been married before. For as to the other party who had never been married before, it cannot be said to be a second marriage.

3428. It may be remarked here, that besides the punishments of second marriages which relate to the dispositions of goods, there were others in the Roman law against the intemperance of women. Thus, those who married again within the year of mourning were noted with infamy.[d] And there were several other punishments ordained against them.[e] Thus, she who abandoned herself to a slave became slave to the master of him to whom she prostituted herself, if she persevered in that amour after a denunciation made by the master of the said slave; which was abolished by Justinian.[f] Thus, Constantine declared the crime of those women who prostituted themselves to their own slaves, even in private, to be capital.[g]

3429. Of these several sorts of punishments, there is only that

[c] *Nov.* 2, *c.* 2, § 1; — *Nov.* 22, *c.* 23.
[d] *L.* 1, *C. de sec. nup.*
[e] *D. l.* 1; — *l.* 2, *eod.*; — *l.* 12, *C. de admin. tut.*
[f] *L. un. C. de senat. Claud. toll.*
[g] *L. un. C. de mulier. quæ se propr. serv. junx.*

which relates to the second marriage of a widow within her year of mourning that has been received into use with us; but even this punishment has been abolished, and we observe the canon law, which has rejected it.[h] For although the incontinency of a woman who marries again within her year of mourning gives her justly a bad reputation, and great inconveniences may follow from it, because of the doubt that may arise which of the two husbands should be reckoned father of a child who should be born, for example, seven or eight months after the marriage of a widow, which she had contracted within two months after the death of her first husband; yet the church tolerating these sorts of marriages to avoid a greater evil, it absolves from the legal infamy the widows who marry again before the said term. And as for the other punishments which do not suit with our policy, which does not admit of slaves, those laws have served as a pattern with us for the regulation which was made by one of the articles of the states of Blois, by which it was ordained that widows who *married again foolishly to persons that were unworthy* should not have power to make any dispositions in favor of such husbands, and that they should be even *interdicted the free administration of their estates.*[i]

3430. As to the subject-matter of this title, it is necessary to distinguish two sorts of rules which have been made concerning second marriages, in order to preserve the rights of the children whose father or mother contract a second marriage. One is of those rules which secure to the children the goods which their father or mother, who marries again, inherited from the father or mother of these children who died first. And the other is of such rules as relate in general to all the other goods of the person who has contracted a second marriage. And these two sorts of rules shall be the subject-matter of two sections, which shall be preceded by a first section, wherein it is necessary to distinguish the several sorts of goods which a person who marries again may be possessed of.

[h] *C. penult. et ult. de sec. nup.*

[i] Ordinance of *Blois*, article 182.

SECTION I.

OF THE SEVERAL SORTS OF GOODS WHICH PERSONS CONTRACTING A SECOND MARRIAGE MAY BE POSSESSED OF.

ART. I.

3431. *Three Sorts of Goods belonging to the Persons who marry a Second Time.* — We must distinguish three sorts of goods which a person who contracts a second marriage, having children by a former, may be possessed of: those which came to the wife from her first husband, if it is the wife, or from the first wife, if it is the husband; those which come to the husband or wife from some one of their common children; and those which they may have acquired some other way.[a]

II.

3432. *Two Sorts of Goods which the Husband or Wife may have from one another.* — A wife may have from her first husband, or a man from his first wife, goods of two sorts; that which any one of them may have acquired by their contract of marriage, and that which the party who dies first may have left to the survivor by a testament or other disposition.[b]

III.

3433. *Goods which the Husband acquires from the Wife, or the Wife from the Husband, by their Marriage.* — We must reckon among the goods which the husband acquires from the wife, or the wife from the husband, by their contract of marriage, all and every thing that is stipulated by the contract itself, or given by the law or by custom without stipulation, in favor of one party, out of the goods of the other, whether the said goods, stipulated or not, have any peculiar name, such as that of nuptial gains, dower, augmentation of dowry, or any other such like name, or that it be some other right which has no particular name.[c]

[a] There can be no goods which are not comprehended in this division.

[b] These two kinds comprehend all. See the first, second, and following articles of the second section. The second part of this article is to be understood of dispositions which are allowed between husband and wife. For there are customs which prohibit differently these dispositions, as has been observed in the preamble of the second section of *Heirs and Executors* in general.

[c] See the first and following articles of the second section, and the texts cited on those articles.

IV.

3434. *Goods which came to the Father or to the Mother from their Children.* — The goods which may come to the father or to the mother from some of their common children consist either in the usufruct they may have of the goods of their children, or in the property of what may fall to them of their succession, whether by testament, or when they die intestate.[d]

V.

3435. *Goods of the Father or Mother coming by other Titles.* — All the other goods which fathers and mothers who marry a second time may have, are those which they have had either of their own patrimony, or have acquired by their industry, or by other titles besides those which have been just now specified.[e]

VI.

3436. *These several Sorts of Goods have their different Rules.* — It has been necessary to distinguish these different kinds of goods. For there is none of them but what is the subject-matter of some one of the rules which follow.[f]

SECTION II.

THE RIGHTS WHICH CHILDREN HAVE TO THE GOODS WHICH THEIR FATHER OR MOTHER WHO MARRIES A SECOND TIME HAD ACQUIRED FROM THE PARTY WHO DIED FIRST.

ART. I.

3437. *The Children have a Right to the Goods which came from their Father or Mother to the Person who marries again.* — When a man who survives his wife, or a wife who survives her husband, contracts a second marriage, having children by the former, all the goods which came to them from the party deceased, whether on the score of gains acquired by their contract of marriage, or by dispositions, whether the same are to have their effect in the life-time of the giver, or after his death, or in any other manner what-

[d] See the first and second sections, *In what Manner Fathers succeed*, &c.

[e] See, touching these sorts of goods, the third section.

[f] We must compare the articles of this section with those of the two following sections, according as they have relation to one another.

soever, are appropriated to the common children from the moment of the second marriage,[a] as shall be explained by the rules which follow.

II.

3438. *The Children acquire the Property of the said Goods by the Second Marriage of their Father or Mother.* — Of all the sorts of goods mentioned in the preceding article, the property thereof accrues to the children from the moment of the second marriage of the father or mother: and the person who marries a second time has only the usufruct of these sorts of goods during life, and cannot make any alienation, engagement, donation, or other disposition of them.[b]

III.

3439. *And the Goods belong to them by equal Portions.* — This property accrues to the said children by equal portions. And the father or mother who marries again has not the liberty to choose among the children, in order to prefer or benefit some of them before the others, neither in the total of these sorts of goods, nor in a part of them. For the second marriage is equally prejudicial to them all, and they are all of them equally concerned and interested therein.[c]

[a] See the following articles, and the texts cited on them.

[b] Fœminæ quæ susceptis ex priore matrimonio filiis, ad secundas (post tempus luctui statutum) transierint nuptias: quidquid ex facultatibus priorum maritorum sponsalium jure, quidquid etiam nuptiarum solennitate perceperint, aut quidquid mortis causa donationibus factis, aut testamento jure directo, aut fideicommissi, vel legati titulo, vel cujuslibet munificæ liberalitatis præmio ex bonis (ut dictum est) priorum maritorum fuerint adsecutæ: id totum, ita ut perceperint, integrum ad filios, quos ex præcedente conjugio habuerint, transmittant. *L.* 3, *C. de sec. nupt.* Habeant potestatem possidendi tantum atque fruendi in diem vitæ, non etiam alienandi facultate concessa. *D. l.* 3; — *Nov.* 2, c. 2; — *Nov.* 22, *c.* 23 *et* 24; — *l. ult. C. de bon. mat.*

Generaliter censemus, quocunque casu constitutiones ante hanc legem mulierem liberis communibus, morte mariti matrimonio dissoluto, quæ de bonis mariti ad eam devoluta sunt, servare sanxerunt: iisdem casibus maritum quoque quæ de bonis mulieris ad eum devoluta sunt morte mulieris matrimonio dissoluto, communibus liberis servare. *L.* 5, *C. de sec. nupt.*

It is from these laws that the second head of the edict of July, 1560, has been taken, which prohibits widows who marry a second time from giving to their new husbands any share of the goods which they had by the gift and liberality of their deceased husbands; and directs that the said goods may be preserved to their common children; and ordains the same thing with respect to husbands, as to the goods which came to them by their wives.

[c] *Nov.* 22, *c.* 25.

IV.

3440. *We do not distinguish the Origin of the Goods in which the Husband or Wife has Gain.* — Whether the wife's marriage portion was of her own proper goods, or whether it came from some other hand, and, in consideration of her marriage, her father, or some other persons, had given it to her; all the gains and advantages which may accrue to the husband out of these sorts of goods are considered as come from the goods of the wife, and are subject to the rules which have been just now explained. And likewise the gains and advantages which the wife may have out of the goods of the husband, whatever way he came by them, are considered as goods come from the husband, and are subject to the same rules.[d]

V.

3441. *These Gains accrue to the Children, although they be not Heirs either to the Father or Mother.* — Seeing the right of the children to these sorts of goods which have been just now mentioned in the preceding articles accrues to them by the bare effect of the second marriage of the father or mother, as has been said in the second article; these goods do belong to them, although they be not heirs either to their father or their mother. And the children who are their heirs will not exclude those who shall have renounced the inheritance. But if any one of the said children, whether he be heir or not, either to the father or to the mother, having once acquired his right, happens to die, leaving children behind him, he may dispose of these gains among them unequally, in the same manner as he may of his other goods.[e]

VI.

3442. *When the Children die Intestate, the Father or Mother who Marries a Second Time has no Share in the Goods which the said Children inherited from their Deceased Father or Mother.* — If one of the children whose mother had married a second time should happen to die, leaving behind him his said mother and brothers, he would have the liberty to dispose in favor of his mother of all his several sorts of goods, and even of those goods of his father's which had come to him by the effect of the rules

[d] *Nov.* 22, *c.* 23, *in f.*

[e] *Nov.* 22, *c.* 26, § 1; — *l.* 7, *C. de sec. nupt.*; — *d. l.* 7, *in f.*

which have been just now explained; and his brothers would have no right to claim either the usufruct or property of the things left to their mother by such disposition.[f] But if the son had died without disposing of his part of the goods which he had from his father, the mother would have no right of property in them, the same remaining to the other children, whether it be that she married again the second time before the death of her son, or only after.[g] For seeing the goods which are appropriated to the children by the second marriage of their mother do belong to them all equally, by the title which is common to them, they have among them the right of accretion therein. But as for the usufruct of that share of the father's goods which belonged to the deceased son, and for all the other goods which he may have had any other way than by his father, or that he might have acquired by his own industry, or by succession, or otherwise, the mother would succeed to them, either as to the property or usufruct thereof, according to the rules which have been explained in their place.[h]

Remarks on the Preceding Article.

3443. We have restrained the rule explained in this article to the mother only, without extending it to the father, because the novel of Justinian from whence the rule has been taken is limited to the mother; but it would seem that their condition ought to be equal. And seeing the rules explained in the preceding articles, which by the former laws related only to mothers, have been extended to fathers by subsequent laws, as appears by the last text cited on the second article, and that Justinian has, in other places, made this general remark, that all the punishments of second marriages are common to the husband and the wife; it seems that we may justly conclude from this principle, that this rule, as well as the others, ought to regard the men as much as the women. *Contra binubos pœnæ communes et viri sunt et mulieris. Nov.* 2, *cap.* 2, *in fin. Communis mulieris et viri multa. Nov.* 22, *cap.* 23. To which we may add the example of another law of the same emperor, who, having enacted much severer punishments against the women, when they separated from their husbands without just cause, than against the men for the same case, did afterwards make those punishments equal, and that for this reason, that in a

[f] *Nov.* 22. *c.* 46, § 1, *in f.* [g] *D. c.* 46, § 2.

[h] See the remark on the succession of mothers at the end of the preamble to the title, *In what Manner Fathers succeed*, and the fourth article of the first section of the same title.

like offence their punishment ought to be the same: *In delicto enim æquali, similes eis imminere pœnas justum esse putamus. Nov.* 127, *cap.* 4. Thus, the spirit of all these rules seems to require that there should be an equality between the man and the wife for all the consequences of second marriages.

SECTION III.

OF THE DISPOSITIONS WHICH PERSONS WHO HAVE MARRIED TWICE MAY MAKE OF THEIR OWN PROPER GOODS.

ART. I.

3444. *The Person who marries twice cannot give more to the Second Husband or Wife than what is equal to the Share of such of his or her Children as has the least Share.* — Although the father or mother who has married a second time retain the property of all the goods, excepting what is appropriated to the children of the first marriage, pursuant to the rules explained in the preceding section; and nothing hinders them from alienating the said goods, and even giving them to other persons, provided they do not thereby encroach on the legitime, or portion reserved by law to the children; yet this liberty is bounded by one of the punishments of second marriages. For it is not allowed to the wife who, having children by a former marriage, has married a second time, to dispose of any sort of her goods in favor of the second husband, nor to the husband to dispose in favor of the second wife, whether it be by their second contract of marriage, under the title of nuptial gains, dower, or other disposition whatsoever, whether the same be to take effect in the lifetime or after the death of the giver, unless they reserve to every one of the children as much as is given away; and the gift will be limited to the portion which the person who has married the second time shall have left to the child to whom he or she has left the least share.[a]

[a] Non liceat plus novercæ vel vitrico testamento relinquere vel donare, seu dotis vel ante nuptias donationis titulo conferre, quam filius vel filia habet, cui minor portio ultima voluntate derelicta vel data fuerit. *L.* 6, *C de sec. nupt.*

It is from this law that the first head of the edict of July, 1560. is taken, which prohibits women who have married twice from giving any part of their goods or movables of the estates which they themselves have purchased, or which have come to them by descent from their ancestors, to their new husbands, to the father, mother, or children of their said husbands, or other person who may be presumed to be in trust for them, more

II.

3445. *Neither directly nor indirectly by the Interposition of other Persons.* — If, to elude the rule explained in the foregoing article, the person who has married a second time had made some disposition in favor of persons interposed, in order to transmit by them to the second husband, or to the second wife more than what had been left to any child of the first marriage who had the least share; the said disposition would be reduced in the same manner as if it had been made in express terms to the second husband, or to the second wife.[b]

III.

3446. *The Computation of the Goods is made according as they are found at the Time of the Death.* — We must understand what is said in the first article, concerning the reduction of what is left to the second husband or wife to the portion of the child of the first marriage who has the least, not of the portion of the goods which the father or mother who makes the disposition may have at the time of making the said disposition that is liable to be reduced, but of the portion of the goods which they shall be found to have at the time of their death. For the goods may be either augmented by acquisitions, or diminished by alienations and losses. And it is only at the time of the death of the father or mother that it can be known what portions the children will have in their goods, so that the gift to the second husband or wife may be compared with the portion of the child who shall have the least, and be made equal to it.[c]

IV.

3447. *What is cut off from the Gift belongs in common to the Children of the First Marriage.* — This diminution of the gift made to the second husband or wife does not accrue to that child who has the least share in the parent's estate; but it goes to all the children together by equal portions. For it is in favor of them all that the diminution is ordained.[d]

than what they have given to such of their children to whom they have given the least share of their estates.

[b] *L.* 6, *C de sec. nupt.*; — *Nov.* 22, *c.* 27. This is so regulated by the edict of July, 1560, concerning second marriages, as has been remarked on the foregoing article.

[c] *Nov.* 22, *cap.* 28.

[d] *Nov.* 22. *cap.* 27.

V.

3448. *The Children of divers Marriages take each of them the Goods which their Parents had by the Marriage of which they are descended.* — When there are children of divers marriages who come to share the goods of their father or mother, those of each marriage take out of the mass of the inheritance that which came by the marriage of which they are descended to their father or mother whose succession they divide. And although the second marriage have not been followed by a third, yet the children of this second marriage have the same right, and the same approbation of what ought to come to them, as those of the first marriage have in the goods that belong to them.[e] But the other goods, which are the proper goods of the father or mother who leave children of different marriages, are divided among all the children by equal portions, unless there be some disposition that distinguishes them which cannot be set aside as being undutiful, and which does not encroach on the right of their legitimes or legal portions.[f]

VI.

3449. *The Usufruct left to the Survivor is not lost by the Second Marriage, unless it was left on that Condition.* — If the surviving father or mother had had a usufruct which the deceased husband or wife had left by any disposition whatsoever, such usufructuary would keep it, although he or she married a second time, unless it had been left on condition that the right to it should cease upon marrying again.[g] And the father who marries again retains with much more reason the usufruct which he had of the goods of his children, and even of those goods which the said children had of their mother.[h]

[e] *Nov.* 22, c. 29; — *l.* 4, *in f. C. de sec. nupt.*
[f] *L.* 4, *D. ad senat. Tertull. et Orphit.*; — *d. l.* 4, *C. de sec. nupt.*
[g] *Nov.* 22, c. 32.
[h] *L. ult. C. de bon. mat.*

BOOK IV.

OF LEGACIES, AND OTHER DISPOSITIONS MADE IN VIEW OF DEATH.

3450. Legacies, and the other dispositions made in view of death, which are to be treated of in this book, are distinguished from testaments, which have been discoursed of in the preceding book, in this, that it is essential to a testament that it contain an institution of an heir or executor, which is a general disposition of all the testator's goods, although there were nothing else in the testament besides this bare institution, seeing the heir or executor is universal successor; whereas these other dispositions are only particular dispositions of certain things. And it is for this reason that, although one may make these sorts of dispositions in a testament, as one may make a testament without any other disposition besides the bare institution of an heir or executor, and one may give legacies and make other dispositions in view of death by other acts than a testament, it has been necessary to distinguish these two matters, and to give to every one its separate rank.

TITLE I.

OF CODICILS, AND OF DONATIONS IN PROSPECT OF DEATH.

3451. Codicils are dispositions made in view of death, which are distinguished from testaments by two characters. One is that of their formalities, which are fewer than those of testaments; and the other is that of their use, which is limited to legacies and fidu-

ciary bequests, whereas a testament ought necessarily to contain an institution of an heir or executor. Thus, all dispositions made in view of death, in which there is no heir or executor named, will only have the nature of codicils, or donations in prospect of death, and not of a testament, even although they should have all the formalities required to a testament; which must not be understood in the sense of the Roman law, and of the provinces where the same is observed. For in the customs, as they admit of no testamentary heir, the distinction between testaments and codicils is there altogether useless; and they give there the name of testaments to all dispositions made in prospect of death.

3452. We shall not repeat here, touching the difference between the use of testaments and that of codicils, what has been said thereof in the fourth section of *Testaments*, where the matter of the codicillary clause, which is often inserted in testaments, hath been handled. The reader will be pleased in reading this title to consult that section of the codicillary clause, where we have been obliged, in order to explain the effect of the said clause in testaments, to explain some rules which relate to the use of codicils; and he will find there at the same time the rules of the Roman law concerning this matter, which he might expect to meet with here. We say nothing here of donations made in prospect of death, which shall be the subject-matter of the third section.

SECTION I.

OF THE NATURE AND USE OF CODICILS, AND OF THEIR FORM.

ARTICLE I.

3453. *Definition of a Codicil.* — A codicil is an act which contains dispositions in prospect of death, without the institution of an heir or executor.[a]

II.

3454. *To make a Codicil, one must have Power to make a Testament.* — Although the codicil do not contain the institution of an executor, as a testament, yet nobody can make a codicil if he has not a right to make a testament. For the liberty of disposing of

[a] § 2, *Inst. de codic.*; — *l.* 2, *C. eod.*

a part of one's goods supposes the same qualities as those that are necessary for disposing of the whole.[b] Thus, they who are incapable of making a testament cannot make a codicil.[c]

III.

3455. *One may make a Codicil either with a Testament or without a Testament.* — As it is free for every one who has power to make a testament either to make a testament or a codicil, one may equally make either the one without the other, or both together,[d] whether in this last case the testament precede or follow the codicil, or both the one and the other be made at the same time; and whether also the testament confirm the codicil that is already made or to be made,[e] or that it make no mention of it at all, provided only that the testament which is made after the codicil do not annul it.[f] And the liberty of all these different manners of disposing is the effect of that which every one has, who has a right to make a will, to dispose either of all his effects by a testament, naming an heir or executor, or only of a part of them by legacies, and other particular dispositions in a codicil, if he intends to have no other heirs besides those of his blood. And one may likewise make several codicils, either at the same time or at different times.[g]

IV.

3456. *One may make several Codicils, which may subsist all together.* — Besides the difference between a testament and a codicil, which results from the rules explained in the first article, it is necessary to remark a second difference, which is a consequence of the former, that, seeing the testament contains a universal disposition of the totality of the testator's goods, there cannot be several testaments of which all the dispositions subsist together; and the last testament annuls the dispositions of the former, if it does not expressly confirm them.[h] But codicils containing only particular dispositions of a part of the goods, one may make several codicils, as has been said in the preceding article, and they subsist all of

[b] *L.* 6, § 3, *D. de jure cod.*

[c] See, touching the causes which make this incapacity, the second section of *Testaments.*

[d] § 1, *Inst. de cod.*

[e] *L.* 8, *D. de jure cod.*

[f] See the eighth article.

[g] § *ult. Inst. de codic.*

[h] *L.* 1, *D. de injust. rupt.*; — § 2, *Inst. quib. mod. test. infirm.* See the first article of the fifth section of *Testaments.*

them,[i] except the changes which a testament or the last codicils may have made.[l]

V.

3457. *The Codicil makes a Part of the Testament when there is one.* — When there is together both a testament and a codicil, whether they be made at one and the same time, or at different times, and whether the testament or codicil make mention of one another, or make no mention, the codicil is considered as making a part of the testament.[m] For the dispositions both of the one and the other are equally the last will of the testator, and the particular dispositions of the codicil ought to be considered as contained in the general disposition which is essential to the testament. Thus, the dispositions of the testament and those of the codicil are interpreted the one by the other, and are reconciled with one another in such things as may subsist both of the one and the other. But if one of them makes any alteration in the other, the last disposition, even in the codicil, will have its effect in that which may be regulated by a codicil.[n]

VI.

3458. *The Next of Kin is charged with the Execution of the Codicils, when there is no Testament.* — As when there is a testament he who is instituted heir or executor is bound to execute the dispositions of the codicils, so when there is no testament it is the heir at law, or next of kin, who is charged with the execution of them,[o] in the same manner as if he were instituted heir or executor by a testament. For he might have been deprived of the inheritance, and it was out of free good-will that the deceased has left it to him.[p] Thus, the dispositions of a codicil have, with regard to him, the same effect as if they were ordained by a testament in which he were made heir or executor.[q]

VII.

3459. *Difference between the Two Sorts of Codicils.* — It follows from the two foregoing articles, that there is a difference between

[i] *L.* 6, *D. de jure codic.*

[l] See the eighth article.

[m] *L. penult. D. testam. quemad. aper.*; — *l.* 16, *D. de jure codic.*

[n] We have added these last words, because, as shall be said in the ninth article, one cannot dispose of the inheritance in a codicil.

[o] *L.* 16, *D. de jure codic.*

[p] *L.* 8, § 1, *D. de jure codic.*

[q] *L.* 2, § 2, *eod.*

the two sorts of codicils, that is, those which happen to be accompanied with a testament, whether the same follow or precede the codicils, and those of persons who die without a testament; that these last are in lieu of a testament, containing all the dispositions of the deceased, in the same manner as if he had made a testament and named therein his heir at law for his executor, charging him with what should be contained in the codicil; whereas the codicil of him who has likewise made a testament has relation to that testament,[r] and makes a part of it, as has been said in the fifth article.

VIII.

3460. *The Codicil hath its Effect, although it be not expressly confirmed by the Testament.* — If he who had made a codicil makes afterwards a testament in which he makes no mention of the codicil, the codicil will nevertheless have its effect. For although it be not expressly confirmed by the testament, yet it is confirmed in so far that it has not been revoked. And it is presumed that the testator has persevered in the same mind, since he has ordered nothing to the contrary.[s] But if the testament contained any dispositions contrary to those made in the codicil, or if it made any alteration in them, the last will would be the rule.[t]

IX.

3461. *One cannot impose by a Codicil a Condition on which the Institution of the Heir or Executor shall depend.* — As one cannot by a codicil make an heir or executor, so likewise one cannot take away the inheritance by a codicil, nor consequently impose on the heir or executor a condition on which it should depend whether he should be heir or not; nor can he take away a condition of this nature imposed by the testament. For these sorts of dispositions would have the effect to take away and give the inheritance; which cannot be done but by a testament, to which more formalities are required than to a codicil.[u]

[r] Intestato patrefamilias mortuo, nihil desiderant codicilli: sed vicem testamenti exhibent. Testamento autem facto, jus sequuntur ejus. *L.* 16, *in f. D. de jure codic.* We may give to this text the meaning explained in this article, although it has another which shall be mentioned in the remark on the fourth article of the following section.

[s] § 1, *in f. Inst. de codic.*; — *l* 3, § 2, *D. de jure codic.*

[t] *L.* 5, *in f. D. de jure codic.*

[u] *L.* 6, *D. de jure codic.*; — § 2, *Inst. de codic.*; — *l.* 27, § 1, *D. de condit. inst.*

X.

3462. *Five Witnesses are required to a Codicil.* — For the validity of a codicil, it is necessary that it should be attested by five witnesses of the same quality with those who are allowed to be witnesses to a testament.[x]

XI.

3463. *Rules of Testaments which agree to Codicils.* — We may add, as a last rule of the nature and use of codicils, that we must apply to them and observe in them all the rules of testaments which may have relation to and agree with codicils. Thus, we may apply to codicils the rules which relate to the capacity or incapacity of persons, whether to make dispositions in prospect of death, or to receive any liberality by such dispositions, the rules touching the interpretation of the said dispositions, those of conditions, and, in general, all the other rules of testaments which may be applied to codicils.[y]

SECTION II.

OF THE CAUSES WHICH ANNUL CODICILS.

ART. I.

3464. *The Codicil is Null for Want of the Necessary Formalities.* — The codicil is null if it wants the number of five witnesses who have the qualifications necessary for giving testimony; or if it wants any one of the other formalities explained in the third section of testaments.[a]

[x] *L. ult.* § *ult. C. de codic.* The formalities of codicils, as well as those of testaments, depend on the usage of the places, as has been said concerning the formalities of testaments. See the first article of the third section of *Testaments*.

[y] One may be able to judge of the truth and use of this rule by the relation which the rules concerning testaments, which have been already explained, have to codicils.

[a] See the text cited on the tenth article of the first section, and the remarks on the same article, and the third section of *Testaments*.

It is necessary to observe, as to the formalities explained in that third section of *Testaments*, that there are some rules of that section which do not agree to codicils; as, for example, those of the ninth and tenth articles, which say that the heir or executor, his children, his father, and his brothers, cannot be witnesses to the testament; for in a codicil there is no heir or executor.

II.

3465. *Or if it is revoked by a Second.* — A first codicil is annulled by a second which revokes it.[b] But if the second makes only some changes in the first, both the one and the other will subsist in what the second shall not have changed. And if the second makes no alteration at all in the first, both of them will have their effect.[c]

III.

3466. *Or by a Testament.* — A testament subsequent to a codicil may either confirm it, or revoke it, or make some alteration in it, with much more reason than a second codicil may: which depends on the manner in which the testator shall have explained himself in the said testament.[d]

IV.

3467. *The Birth of a Child annuls the Testament and Codicil.* — If he who, having no children, had made a codicil and a testament, happens afterwards to have children, the testament and the codicil will be void.[e]

Remarks on the Preceding Article.

3468. This text relates only to the case where there is both a codicil and a testament: and it is said in another text, that when there is only a codicil without a testament, the birth of a child does not annul it. *Agnatione sui hæredis nemo dixerit codicillos evanuisse. L. pen. D. de jure cod.; — l.* 16, *cod.* This difference, which the Roman law makes between a codicil without a testament and the codicil of him who had also made a testament, is founded upon this, that he who makes a codicil, and dies without making any testament, dies with an intention to leave his succession to his heir at law, and that therefore his intention is that his heir at law should execute the codicil; whereas, when there is both a testament and a codicil, it is a rule in the Roman law that the codicil shall follow the condition of the testament, and that it shall

[b] *L.* 3, *C. de codic.*

[c] This is a consequence of the power which one has to make several codicils. See the fourth article of the first section.

[d] See the fourth, fifth, and eighth articles of the first section.

[e] Rupto testamento posthumi agnatione, codicillos quoque ad testamentum pertinentes non valere, in dubium non venit. *L.* 1, *C. de codic.*

subsist if the testament ought to subsist, or that it be void if the testament is annulled. *Intestato patrefamilias mortuo nihil desiderant codicilli, sed vicem testamenti exhibent: testamento autem facto, jus sequuntur ejus. L.* 16, *in fine, D. de jure cod.*

3469. This law, which makes all the codicils of those who have made no testament to subsist without distinction, might in certain cases trespass against equity. For if we suppose that a man who was not married, and had no hopes of having any children, had made a codicil in which he had disposed of the greatest part of his estate, thinking to leave the remainder, which would be the least part of it, to his heir at law, a collateral relation, and one who did not stand in need of it; and that afterwards he should happen to marry, and to have children, and to die without revoking this codicil, either through forgetfulness, or because he had been surprised by death; it would seem very hard to make such a codicil to subsist in a case where even a testament would be annulled, not only as to the institution of an heir or executor, but as to all the other dispositions thereof, even the most favorable.* And if equity requires that the birth of a child should annul in its favor all the dispositions of a testament, the same equity would seem likewise to require that the birth of a child should annul also the dispositions of a codicil, although it be not accompanied with a testament; seeing this circumstance is wholly indifferent to the right of the child, who is as much or more injured by the dispositions of such a codicil, as he can be by a testament. So that, seeing the motive which has induced us to receive into our usage the dispositions of the Roman law is only the equity thereof, which renders those dispositions of the Roman law which we observe just in all places, and at all times, and that we reject such dispositions thereof as seem to deviate from that equity, and which savor too much of those niceties which we see so frequent there, we did not think it proper to set it down as a rule, that the birth of a child does not annul a codicil when there is no testament. Neither have we put down the contrary in this article; but we have contented ourselves with making this remark here concerning this difficulty, in which we should be afraid to trespass against equity if we should lay it down as a general rule, either that all codicils are valid when there is no testament, or that they are null when there is a testament which is found to be null. For this first rule would be at-

* See the fifteenth article of the fifth section of *Testaments*.

tended with the inconvenience that has been just now taken notice of, if the birth of a child should not annul a codicil that is not accompanied with a testament. And it may be said of the other rule of the Roman law, which annuls indifferently all codicils when there is a testament which proves to be null, whether the testament be made after or before the codicil, or be made at the same time, that it may also have its inconveniences, except in the cases where the codicils and testaments have such a connection with one another that the dispositions which they contain ought all of them either to subsist or perish together; as, for example, if a testator, who, having no mind to explain his particular dispositions by a testament, had only named his heirs or executors in the testament, requiring them to execute the dispositions which he should afterwards make by a codicil, had accordingly made a codicil which contained legacies with which he burdened his heirs or executors differently and apart, one with some, and the others with others, and it happened that this testament proved to be null, either by reason of the incapacity of the heirs or executors, or for want of some formalities; one might without transgressing against justice or equity annul this codicil so linked and united to this testament. But if a testator, who, without any design of making a testament, had first made a codicil, containing some dispositions in favor of poor relations or servants, or for some charitable uses, should afterwards chance to make a testament, and institute for his heir or executor either his heir at law, or even some other person, would it be necessary, in order to do justice, that, if this testament should prove null, the codicil should likewise be annulled, because it is the rule in the Roman law, that, when there is a testament, all codicils are to follow the fate thereof?

3470. All that has been said here touching the difference of codicils in the cases where there is no testament, and in the cases where there is, concerns only the provinces which are governed by the written law. For as to the customs, the reader has already been sufficiently informed, that, as all the dispositions which are made there are only codicils, seeing they cannot there make an heir by a testament, this difference is of no manner of use in them. And as for the provinces which are governed by the written law, we have seen there, and there are still to be seen at this day, several lawsuits which are occasioned by the difficulties which arise from certain cases which are pretended to be excepted from the rule of

the Roman law, which annuls all codicils when there is a testament which is found to be null. It is easy to imagine that the liberty of excepting certain cases is a source of many lawsuits. Which makes it to be wished that there were on this subject some regulation, which should make the validity of codicils either to depend absolutely on that of testaments, when there are any, or to be wholly independent on them, or which should give some temperament thereto, if any that is just and necessary can be found.

V.

3471. *Other Causes which annul Codicils.* — We may add, for a last rule concerning the causes which may annul a codicil, that we must join to those causes which proceed from the want of formalities, and to the others that have been just now explained, some others of the number of those which also annul testaments; such as if the person who had made a codicil dies under an incapacity incurred by a sentence of condemnation; if the codicil has been made by force; if he who made it did afterwards cancel it.[f]

SECTION III.

OF DONATIONS MADE IN PROSPECT OF DEATH.

3472. It is necessary to distinguish, in these terms of *donation in prospect of death*, two different ideas of two things which they signify in their common acceptation with us. For we may understand by these terms the deed or writing which contains the disposition of the donor, as we understand by the word *codicil* the writing which contains the legacies; and we may likewise understand by these terms of *donation in prospect of death*, the very disposition itself, that is, the beneficence contained in the writing, as the legacy is contained in the codicil. Thus, whereas with respect to legacies we make use of two distinct words, to wit, that of *codicil*, which signifies the writing in which the legacies are contained, and the word *legacy*, which signifies the dispositions made in the codicil; in the case of donations made in prospect of death we have only this one term, which has both senses, and which signifies equally the disposition of the person who gives, and the writ-

[f] See the fifth section of *Testaments*.

ing which contains the said disposition; which may proceed from hence, that usually the terms *donation in prospect of death* are only made use of when there is one only donation made by a particular act or writing; whereas codicils may contain one or more legacies, and likewise other dispositions.

3473. It was necessary to observe the distinction of these two meanings which the terms *donation in prospect of death* may have, in order to prevent the reader's forming to himself a wrong idea of what is the subject-matter of this section. For he might imagine that this section should contain all the rules which may relate to donations made in prospect of death, either as to the formalities of the acts or writings which contain these sorts of dispositions, or as to their nature. And he might likewise fancy, that, as in the preceding sections we have explained only what concerns codicils, without saying any thing of legacies, which shall be the subject-matter of the subsequent title, so we should make the like distinction in donations because of death. But since we are to explain the detail of the rules relating to legacies only in the following title, and the said rules are applicable to donations made in prospect of death, they being of the nature of legacies, we shall explain in this section only such rules concerning donations made in prospect of death as ought to be separated from those of legacies, whether it be that the said rules relate to the donation itself, that is, to the liberality of the donor, or to the writing which contains it; and it will be easy to distinguish in every article what it relates to.

3474. Before we proceed to the explanation of the few rules of which this section consists, it is proper to observe, that, seeing the bare word *donation* comprehends the donations that are to take effect in the lifetime of the donor, as also the donations that are to have their effect only after the donor's death, it is necessary to distinguish aright the nature of these two sorts of donations, and for that end to consult what has been said of this matter in the preamble to the title of *Donations that have their Effect in the Lifetime of the Donor*, and likewise what is there said of the maxim, *To give and to retain is good for nothing;* which has been explained in the same place.

ART. I.

3475. *Definition of a Donation made in Prospect of Death.* — A donation made in prospect of death is a disposition made by him

who, not being willing to strip himself in his lifetime of the thing which he intends to give away, desires that after his death it may go to the person whom he has a mind to favor with it, and that he should have it rather than his heirs.[a]

Remarks on the Preceding Article.

3476. In the Roman law they distinguished three sorts of donations because of death. The first is of those where, without any present danger of death, one gives out of a view that he must some time or other die. The second is of those where the donor, finding himself in some danger of death, gives in such a manner that he strips himself of the thing which he gives away, and conveys it to the donee, whom he makes master of it. And the third is of those donations where, in the same case of a danger of death, one gives in such a manner that the thing given shall not belong to the donee till after the donor's death. *Julianus libro septimo decimo Digestorum tres esse species mortis causa donationum ait. Unam cum quis nullo præsentis periculi metu conterritus, sed sola cogitatione mortalitatis donat. Aliam esse speciem mortis causa donationum ait, cum quis imminente periculo commotus, ita donat, ut statim fiat accipientis. Tertium esse genus donationum ait, si quis periculo motus non sic det ut statim faciat accipientis, sed tunc demum cum mors fuerit secuta.* *L.* 2, *D. de mort. caus. donat.*; — § 1, *Instit. de donat.*

3477. We shall not set down here as rules these three ways of giving in prospect of death. This distinction does not agree with our usage; for it is to be observed that the second of these three sorts of donations in prospect of death has a character quite opposite to the essential character we give to donations made in view of death, which is, that they are revocable, and that they do not put the donees in possession till after the death of the donor. Whence it follows, that this second sort of donation would be a donation that takes effect in the donor's lifetime, since it would put the donee immediately into possession. And it is to be observed, also, that by our usage those who are in imminent danger of death, through sickness or otherwise, cannot make donations that are to have their effect in the donor's lifetime. As to the two other sorts of donations in prospect of death, according to

[a] Mortis causa donatio est, cum quis habere se vult quam eum cui donat: magisque eum cui donat, quam hæredem suum. *L.* 1, *D. de mort. caus. donat.*; — § 1, *in f. Inst. de donat.*

our usage it is indifferent whether the person who makes the donation because of death be in immediate danger of it, or not. And they must all of them be in writing, and made in due form.

3478. What has been just now said, that by our usage those who are in imminent danger of death cannot make donations that are to have effect in the lifetime of the donor, is to be understood of donations of immovable goods, or of sums of money, or of other things that are not actually delivered to the donee; for what is actually delivered, the donation thereof is good and valid, unless it be done in fraud of the law, or of custom, beyond the bounds of what one may give away in prospect of death.

3479. It may likewise be remarked concerning that usage of the Roman law as to donations in prospect of death, that they reckoned in the number of such donations the other ways by which it may happen that one has something because of the death of another, which they called *mortis causa capio;* as if a father gave something because of the death of his son. It would be needless to instance in more examples of this kind, there being nothing in this matter that deserves our observation. *V. l.* 8, 12, 18, *et* 21, *D. de mort. causa donat. et capion.*

II.

3480. *Wherein Donations made in Prospect of Death and Codicils do agree, and wherein they differ.* — There is this difference between a codicil and a donation in prospect of death, that the name of codicil is given indifferently to all acts which contain the several dispositions which one may make in prospect of death besides that of the institution of an executor, whatever number there be of the said dispositions, and of what nature soever they may be; but by a donation in prospect of death is properly understood only one single particular disposition. Thus, he who, besides making a testament and codicils, if he had a mind to make any, or without making either testament or codicil, had a mind to dispose of a sum of money, or other thing, in favor of some person, might give to the act or writing that should contain the said disposition the name of donation because of death, which one does not give to the other acts which contain several dispositions: but he might likewise give to this disposition the name of codicil. Thus, it is the same thing for a donation in prospect of death, whether it be expressed under this name in a writing made expressly for that

purpose, or whether it be contained in a codicil, either under the name of legacy, or under that of donation.[b]

III.

3481. *Formalities of Donations made on Account of Death.* — Donations made in prospect of death being of the same nature with codicils, the same formalities ought to be observed in them: and as five witnesses are required to a codicil, the same number is likewise necessary to a donation in prospect of death.[c]

IV.

3482. *Who may make Donations in Prospect of Death.* — The same persons who may or may not make testaments or codicils, may also or may not make donations because of death. For the same capacity is required for this sort of dispositions as for the two others.[d]

V.

3483. *The Rules of Codicils agree to Donations made in Prospect of Death.* — We ought to apply to the acts or writings which contain donations made in prospect of death, the other rules which relate to codicils, as they may agree with them. And it will be easy to discern those rules without repeating them in this place.[e]

VI.

3484. *And also the Rules of Legacies.* — As to what concerns the nature of donations made in prospect of death, it being the same with that of legacies,[f] they have also the same rules, which shall be explained in the following title.

[b] See the sixth article of this section, and the third article of the first section of *Legacies*, and the texts cited on them. As to this whole article, the reader may consult the preamble of this section.

[c] See the text cited on the tenth article of the first section of *Codicils*, and the remark there made upon it. Quinque testibus præsentibus. *L. ult. C. de donat. caus. mort.*

[d] See the second section of *Testaments*.

[e] See the two preceding sections.

[f] § 1, *Inst. de donat.*; — *v. l. ult. C. de donat. caus. mort.*

TITLE II.

OF LEGACIES.

3485. Legacies are particular dispositions on account of death, which distinguish the legatees from the heir or executor, in that the legatees succeed only to that which is taken off from the inheritance to be given to them, and that they are as it were particular successors; whereas the heir or executor is universal successor to the whole mass of the goods.

3486. There is likewise this difference between legatees and executors, that an executor cannot be made but by a testament, whereas legatees may be made, not only by a testament, but also by a codicil. And it is the same thing for the legacies, whether they be contained in one or other of these two sorts of dispositions, which are distinguished with regard to legacies only in this, that the legacies left by a testament are due from the executor, and those left in a codicil, without a testament, are due from the heir at law, or next of kin.

3487. It is necessary also to remark here, as we have done in other places, that in the customs of France, if a testator institutes any other person for his heir or executor besides him who has a right to succeed by law, if there were no testament, they do not give him the name of heir, but only that of universal legatee. For although he succeeds to all the goods and to all the rights which the testator has power to dispose of, yet the customs give the name of heir only to the heir of blood, to whom they appropriate the goods which they do not allow the testator to dispose of; and this legatee is distinguished from particular legatees by this quality of universal legatee. Thus, the disposition made in his favor is not called the inheritance, even although it should comprehend all the effects of the testator, if he had none but what he had power to dispose of; but it is only called a universal legacy.

3488. Seeing there are some matters which are common both to legacies and to the institution of an heir or executor, and that it was necessary to explain them under the title of *Testaments*, we shall not repeat here what has been already explained of these matters, as that which concerns the rules of the interpretation of the dispositions of the testator, those relating to conditions, descriptions, and other manners which may diversify the said dispo-

sitions, the rules concerning the right of accretion, of transmission, and others which have been explained under the title of *Testaments*. Neither shall we say any thing here of the formalities necessary to legacies, this matter having been explained in the same title of *Testaments*, and in that of *Codicils*, which are the dispositions by which legacies are given. And, in general, the reader ought to apply to legacies all the rules explained in those other titles, according as they are capable of being applied thereto. And under this title we shall treat of the rules which are peculiar to the matter of legacies.

3489. It is further to be remarked, that under the name of legacy it is necessary to comprehend that kind of dispositions on account of death which are called particular fiduciary bequests, distinguished from legacies in the ancient Roman law both by their name and their nature, but confounded with one another by the latter laws, which have given to the said fiduciary bequests the nature of legacies, and have made these two sorts of dispositions equal in every thing.[a] But because there is in reality some difference between legacies and particular fiduciary bequests, and that we shall be obliged to make use of this term *fiduciary bequest*, and to quote laws in which it is mentioned, it is necessary not only to inform the reader thereof, but to explain here, on this subject, that which ought to precede the rules, in order to make them rightly understood.

3490. A fiduciary bequest is a disposition by which the testator prays his heir or executor to deliver to some person either the whole succession, or a part thereof, or something in particular. The first use of fiduciary bequests was such, that it depended wholly on the heir or executor either to comply with this request of the testator's, or not to comply with it, as he thought fit; and it was from thence that the Latin word *fideicommissum* came, because it was committed or remitted to the faith and integrity of the heir or executor; but afterwards the heirs or executors were compelled by law to execute these sorts of dispositions.[b]

3491. The fiduciary bequests of the whole inheritance, or of a part of it, are a matter which shall be explained under the third title of the fifth book. And as for particular fiduciary bequests, although, as has been just now remarked, they have been made

[a] Per omnia exæquata sunt legata fideicommissis. *L.* 1, *D. de legat.* 1.
[b] *V. tit. Inst. de fideicom. hæred. et tit. de sing. reb. per fideicom. relict.*

like unto legacies, yet it is necessary to distinguish in these fiduciary bequests two sorts of rules: those which are common to them and to legacies, which shall be explained under this title; and some others that are peculiar to them, which shall be explained in the second section of the third title of the fifth book.

3492. It is necessary, finally, to remark on the subject-matter of this title, that, donations made in prospect of death being distinguished from legacies only by name, as has been remarked in the third section of the preceding title, we must apply to those donations the rules which shall be explained under this title. Thus, the reader must remember that what shall be here said only of legacies ought likewise to be understood of fiduciary bequests, and of donations because of death, unless there be some difference, which it will be easy to discern.

3493. It is not needful to explain here the different kinds of legacies which had been in use in the Roman law. For although this knowledge might be of use for the right understanding of the texts of some laws, Justinian having confounded all these sorts of legacies together, giving to them all the same nature and the same effect,[c] yet the explanation of this distinction would be useless. However, we may take notice of one way of bequeathing, which had been rejected by the ancient law, and which Justinian has allowed, and which with us might either be approved or rejected, according to the circumstances. It was that manner of bequeathing which they called, by the way of punishment, *pœnæ nomine*,[d] when the testator ordained or forbade something to his heir or executor, or imposed some condition on him, adding thereto a penalty either of doing or giving something in case he should fail to execute the will of the testator. Thus, by our usage, a testator might legally order the payment of a legacy at such a time, and impose the payment of interest as a punishment for his delay to make payment. Thus, a testator might require his heir or executor to take into partnership with him in his commerce a person to whom he had a mind to procure that advantage; adding, that, in case his said heir or executor would not receive such a one for his partner, he should give him a certain sum of money. But our usage would not approve of a testator's enjoining his heir or executor to marry, or not to marry, his daughter to such a one, or, if he should contravene

[c] § 2, *Inst. de legat.*; — *l.* 1, *C. comm. de legat.*
[d] § *ult. Inst. de legat.*; — *l. un. C. de his quæ pœn. nom.*

his order, to give to such a one the sum of so much. And although such a legacy seems to be approved by Justinian, contrary to the ancient law which condemned it,[e] yet it would seem to be an encroachment on the liberty of marriage, and by that means be contrary to decency and good manners.

SECTION I.

OF THE NATURE OF LEGACIES, AND OF PARTICULAR FIDUCIARY BEQUESTS.

3494. The remark which has been made in the preamble of this title, on fiduciary bequests, explains the reason why we add to the title of this section particular fiduciary bequests.

ART. I.

3495. *Definition of a Legacy.* — A legacy is a particular disposition, because of death, in favor of some person, either by a testament or a codicil.[a]

II.

3496. *Definition of a Particular Fiduciary Bequest.* — A particular fiduciary bequest is a disposition by which the executor or a legatee is entreated to restore, or to give to a third person, a certain thing.[b]

III.

3497. *Legacies, Particular Fiduciary Bequests, and Donations because of Death, are all of the same Nature.* — It is the same thing for the validity of the dispositions of a testator, whether he express himself in relation thereto in the words of a legacy, or of a fiduciary bequest, or a donation because of death; for all these sorts of dispositions have the same nature and the same use:[c] and whether the testator express himself in terms of entreaty to his executor, or whether he commands him, or, without addressing himself to the executor, explains his will, the executor will be

[e] *V. d.* § *ult.*

[a] *L.* 36, *D. de legat.* 2; — § 1, *Instit. de legat.*; — *l.* 116, *D. de legat.* 1.

[b] *Inst. de sing. reb. per. fideicom. relict.*

[c] *L.* 1, *D. de legat.* 1; — *l.* 87, *D. de legat.* 3; — § 1, *Instit. de donat.*

bound to execute it.[d] And it is the same thing if it is a legatee whom the testator requires or entreats to give or remit a sum of money, or any other thing, to a third person.[e]

IV.

3498. *Wherein consists the Validity of these Dispositions.* — The validity of legacies, of fiduciary bequests, and of donations on account of death, implies two things; the quality of the disposition, which is that wherein their nature does consist, and the formalities of the acts which contain them, whether they be testaments, codicils, or donations.[f]

V.

3499. *Their Nature, and the Formalities to be observed in them.* — The quality of these dispositions which constitutes their nature consists in the essential characters which the laws prescribe, and on which it depends whether they have their effect, or whether they be null. And the formalities respect the acts or writings which contain these dispositions, and which are the proof of their verity; which is held to be well established, when the said acts are according to the form regulated by law. These formalities have been explained in their proper place.[g] And as for the nature and characters of these dispositions, we must join to what has been said of that matter in the first three articles all the rules of this title, and of the preceding titles, in so far as we can judge they have any relation to them.

VI.

3500. *Essential Characters of these Dispositions.* — It is essential to the validity of these three sorts of dispositions, that the persons who make them have the power to do it, that those in favor of whom they are made be not incapable of them, and that the things which are disposed of be such as may be disposed of. These three characters shall be the subject-matter of the two following sections, where we must understand what shall be said only of legacies as if it had been also expressed of fiduciary bequests, and of donations because of death.[h]

[d] *L.* 2, *C. com. de legat.* [e] *L.* 1, *C. comm. de leg.* See the seventh article.

[f] See the following article.

[g] See the third section of *Testaments*, the first section of *Codicils*, and the third article of the third section of the same title.

[h] See the two following sections.

VII.

3501. *A Testator may burden the Legatees with Legacies to other Persons.* — A testator may burden with a legacy, or a fiduciary bequest, not only his executor, but likewise a legatee, as has been said in the third article. And if he had made a testament, or a codicil, or a donation because of death, he might burden by new dispositions those to whom he had given something by former ones, which, having been made only in prospect of death, may suffer this diminution.[i]

VIII.

3502. *A Thing left to several Persons is divided equally among them.* — If one and the same thing is bequeathed to two or more persons, without distinction of portions, it will be equally divided among them, share and share alike.[l]

IX.

3503. *A Legatee of several Legacies cannot restrain himself to those that are without Burden.* — As one may bequeath one and the same thing to several persons, so one may leave to one person different legacies, either without a charge or with a charge: and the legatee may accept those which he shall think fit, and reject the others; unless it be that those which he refuses would oblige him to some charge. For in this case he could not divide the legacies, and by accepting one he would be liable to the charges of the others.[m]

X.

3504. *Legacies are only due after all the Debts are paid.* — We may add as a last rule of the nature of legacies, and of other dispositions on account of death, that since testators can dispose only of their goods, the debts owing by the testator, even those that are the least favorable, are preferred before all his dispositions, of what kind soever they be.[n]

[i] Eorum, quibus mortis causa donatum est, fideicommitti quoquo tempore potest. *L.* 77, § 1, *D. de legat.* 2. See the last of the texts cited on the third article.

We have added in the article, that the testator may charge with legacies those to whom he has given something by preceding dispositions made in prospect of death; for he could not impose new burdens on those to whom he had made simple donations that were to have their effect in his lifetime.

[l] *L.* 19, § *ult. D. de leg.* 1.

[m] *L.* 5, § 1, *D. de leg.* 2.

[n] *L.* 66, § 1, *D. de leg. Falc.*

SECTION II.

WHO MAY GIVE LEGACIES, AND WHO MAY RECEIVE THEM.

3505. We must understand what shall be said of legacies hereafter in the sense which comprehends particular fiduciary bequests and donations because of death, as has been already sufficiently remarked; and it is for brevity's sake we insert here only the word *legacy*.

ART. I.

3506. *Who may give Legacies.* — The same persons who may make a testament may give legacies. Thus, to know if a person may give a legacy, we must examine if he is not under some of the incapacities which hinder a man from making a testament, and which have been explained in their proper place.[a]

II.

3507. *At what Time are we to consider the Capacity or Incapacity of the Person who leaves the Legacy.* — Seeing the rules touching the incapacity of bequeathing are the same with those of the incapacity of making a will, the rules concerning the time when we are to consider the incapacity of the person who disposes are the same with respect to legacies as with respect to the institution of an executor, and they are explained in the same place.[b]

III.

3508. *Who may receive Legacies.* — All persons who are capable of being named executors of a will are also capable of receiving legacies; and it is only such as are capable of being executors that are capable of being legatees. Thus, in order to know who those persons are, we need only to consult the rules which are set down in their proper place.[c]

IV.

3509. *Persons unworthy of Legacies.* — We must not rank in the number of persons incapable of legacies those who render

[a] See the second section of *Testaments*.
[b] See the fourteenth article, and those that follow, of the second section of *Testaments*.
[c] See the same second section of *Testaments*.

themselves unworthy of them. Thus, for example, a legatee who by collusion with the next of kin, or out of some other motive, should conceal the testament, in which he had a legacy left him, would render himself unworthy of it.[d] And every legatee in whom should be found any one of the causes which render the heir or executor unworthy of the inheritance, and which have been explained in their place, would be also unworthy of the legacy.[e]

V.

3510. *The Same.* — We must not reckon among the persons unworthy of legacies him who, being next of kin, had impugned as null the testament which contained a legacy in his favor. For although the testament were confirmed against his pretension, yet seeing it did not anyways injure the honor of the deceased, and that he only exercised a right which he ought not to be deprived of by this legacy, nothing could be imputed to him that should render him unworthy of the legacy. But if this legatee, after having received his legacy, should impeach the will as being forged, pretending that the executor had made it, and the will should be confirmed by sentence, he would lose the legacy, because of the injury he had done to this executor. But if the legatee who is next of kin, having received the legacy left him, should afterwards attempt to annul the testament because of some flaw therein, which ought to have this effect, such as the incapacity of the person instituted heir or executor, his action would be received, and it would be no bar to him that he had approved the testament by receiving his legacy. And, in general, when the question is whether a legatee who receives his legacy loses the right which he may have to the inheritance, it is by the circumstances of his person, of his condition, of his age, and others, that it ought to be decided.[f]

VI.

3511. *Particular Rules concerning Persons who may receive Legacies.* — Although, for understanding who the persons are to whom legacies may be left, it be sufficient to know, that whoever is not incapable of being heir or executor may be a legatee; yet there

[d] *L.* 25, *C. de legat.*

[e] See the third section of *Heirs and Executors* in general.

[f] *L.* 7, § 1, *D. de his quæ ut ind. auf.* See the second and following articles of the third section of an *Undutiful Testament.*

are in relation to this subject some particular rules, which it is necessary to distinguish from this general rule, either because they are exceptions to it, or for other considerations, which one will be able to judge of by the rules which follow.[g]

VII.

3512. *One may bequeath Alimony to a Person incapable of other Legacies.* — The incapacity of inheriting or receiving a benefit by some disposition made in prospect of death does not comprehend legacies of alimony. For the same being of an absolute necessity to whosoever lives, it is but equitable that all persons whatsoever should be capable of receiving it. Thus, one may bequeath alimony even to those who are under sentence of death, or condemned to other punishments, which imply civil death; and whilst they continue in life, they may enjoy a legacy limited to this use.[h]

VIII.

3513. *The Testator may leave a Legacy to his Executors.* — A testator may leave a legacy, not only to other persons besides his executors, but even to the executors themselves, if they be more in number than one; for one executor alone having all the goods of the inheritance, he cannot owe himself a legacy. Thus, where there are two or more executors, the testator may bequeath either to any one of them alone, or to every one of them, what he thinks fit, and distinguish them by particular dispositions of certain things.[i]

IX.

3514. *A Legacy left to Two Executors, how to be divided.* — If a testator had left a legacy in common to two of his executors or testamentary heirs, they would share it by equal portions, although their portions in the inheritance were unequal, unless the testator had distinguished the portions of the legacy in the same manner as those of the inheritance. But, not having done it, their con-

[g] See the following articles.

[h] *L.* 3, *D. de his quæ pro non script.* The same motives which make a legacy of alimony to a person condemned to death, or to any other punishment which implies civil death, to subsist, seem to justify the like legacy in favor of an alien who should stand in need of this relief; and his incapacity of inheriting ought not to exclude him from the benefit of a legacy of this nature.

[i] *L.* 17, § 2, *D. de leg.* 1.

dition, although different in respect of the inheritance, is the same in the legacy.[l]

X.

3515. *The Testamentary Heir, who is also a Legatee, may keep to his Legacy, and renounce the Inheritance.* — If the testamentary heir, who is likewise a legatee, renounces the inheritance, he will not be for that deprived of his legacy. For it was free for him to abstain from one of the two favors, and to keep to the other.[m] And if it was a son that was instituted heir in part, and named a legatee by the testament of his father, he might likewise keep to the legacy, without being charged with contravening the will of the testator his father; since he might very decently excuse himself from meddling in the affairs of the inheritance, and leave it to those who were called to the succession with him.[n]

XI.

3516. *One may leave a Legacy to Unknown Persons, and in what Sense.* — A testator may leave a legacy to a person unknown, and even uncertain, provided that some circumstances mark his intention, and the motive that induced him to it, by which we may come at the knowledge of the person to whom he has left the legacy. Thus, for example, if a testator had bequeathed a sum of money to a person who should do such a piece of service either to himself, or some one of his children, or of his friends; he who should happen to be the person who rendered this service would be the legatee, although the testator had died without knowing who had done him that good office.[o]

XII.

3517. *A Legacy to one of many Persons.* — One may leave a legacy to one person among many, as to one of the children of a son, or of a relation, or of a stranger; whether the testator explain the circumstances which might distinguish this legatee, or that he leaves the choice of him to his heir or executor, or to some other person. And in the first case, if the legatee is sufficiently distinguished, he alone will have the legacy, or if he is not sufficiently distinguished, all the children will have their share in it. But, in

[l] *L.* 67, § 1, *D. de leg.* 1.
[m] *L.* 17, § 2, *D. de leg.* 1.
[n] *L.* 87, *eod.*; — *l.* 12, *C. de leg.*
[o] *L.* 5, *D. de reb. dub.*

the second case, he who shall have been named by the heir or executor, or other person, to whom the testator had given the power of naming, will be the legatee.[p] And if he who had the power of naming dies without having named any one, the legacy will belong either wholly to one child alone, if there remains no more than one, or it will belong in common to those who shall remain. Thus, although the legacy were destined only for one child, yet, none of them being distinguished from the others, it would go to them all.[p]

XIII.

3518. *A Legacy to a Town, or other Corporation.* — One may leave a legacy to a town, or other corporation whatsoever, whether spiritual or secular, and direct that it be applied to some honest and lawful use, such as for public buildings, for maintaining the poor, or for other charitable uses, or for the public good of the said society.[q] And we must consider as a legacy left to a town, or other corporation, that which is left to those who compose the said body, as to the inhabitants of such a town, or other place, to the canons of such a chapter, to the monks of such a monastery.[r] But we must not reckon in the number of corporations capable of legacies those which are not duly established and approved. But if the legacy were left personally to the particular persons who had a mind to form themselves into a society, that they might reap the benefit of the legacy, either every one for himself in particular, or for the society in general, when it should be established, the legacy might subsist according to the circumstances.[s]

SECTION III.

WHAT THINGS MAY BE DEVISED.

3519. As to things which may be devised, it is necessary to observe a distinction of legacies of two sorts. One is of the legacies of things, of which the property passes to the legatee; and the other is of legacies which do not convey to the legatee the property of any thing, but only an enjoyment, or the use and

[p] *L.* 17, § 1, *D. de leg.* 2; — *v. l.* 24, *eod.*; — *l.* 67, § 2, *D. de legat.* 2; — *d. l.* 67, § 7.
[q] *L.* 177, *D. de leg.* 1; — *l.* 122, *eod.*
[r] *L.* 2, *D. de reb. dub.*
[s] *L.* 20, *D. de reb. dub.*

profits of a thing for some time, or during his life, such as a usufruct, a pension, alimony, or other annuity. The legacies of the first of these two kinds shall be explained in this and the following section, and those of the second sort shall be the subject-matter of the fifth section.

Art. I.

3520. *One may devise every Thing that is in Commerce.* — One may devise all sorts of things, movables or immovables, rights, services, and things of any other kind that are in commerce, and that may pass from the use of one person to that of another.[a]

II.

3521. *One cannot devise Things that are Public or Consecrated.* — Since one can devise only what may pass to the use of the legatee, the legacy of a public thing, or of a consecrated place, would be without effect, and the legatee would not so much as have the value of these sorts of things, whether the testator was ignorant of the quality of the things, or knew it. And in this last case such a disposition would be the act of a madman.[b]

III.

3522. *One may bequeath a Thing belonging to another Person.* — Although one cannot dispose of what belongs to others, yet a testator may bequeath a thing which belongs to another.[c] And such a legacy may have its effect, or not have it, according to the rules which follow.

Remarks on the Preceding Article.

3523. Although it may seem somewhat strange that one can bequeath a thing which he has no right to dispose of, and espe-

[a] *L.* 41, *D. de legat.* 1. See the following article.

[b] Campum Martium, aut forum Romanum, vel ædem sacram legari non posse constat. Sed et ea prædia Cæsaris quæ in formam patrimonii redacta, sub procuratore patrimonii sunt, si legentur, nec æstimatio eorum debet præstari. *L.* 39, § *penult. et ult. D. de legat.* 1. Furiosi est talia legata testamento adscribere. *Dict: l.* § 8, *in f.*

What is said in this article of a consecrated place is to be understood of holy, sacred, or consecrated places that are set apart for public use, such as a church or church-yard. For the legacy of a house in which there was a chapel for the use of the said house would comprehend the chapel, in the same manner as the legacy by an ecclesiastic of his silver-chapel would take in the consecrated plate belonging to it.

[c] Non solum testatoris vel hæredis res, sed etiam aliena legari potest. § 4, *Inst. de leg.*

cially a thing which he knows to be another's, and that it does not seem possible that one in his right senses should make such a disposition; however, seeing a testator may oblige his heir or executor to purchase an estate for the use of a legatee, this would be in effect to bequeath a thing that is another's. Thus, we must understand what shall be said in the following article as meant of dispositions of this quality, or such that one may judge that the testator did not intend to make a ridiculous legacy of a house, for instance, belonging to his neighbour, without having any circumstance that may justify such a disposition from the imputation of extravagance. For it ought to have some foundation and some motive that may agree with good sense, and render it just.

3524. It would seem that it is only in this sense that we are to understand the rules which we find in the Roman law touching this matter, and that the authors of those rules neither could, nor intended thereby to, authorize the impertinent dispositions of things to which neither the testator nor his heir or executor had any right, and when there was no circumstance that could make such a disposition appear to be reasonable; as we ought likewise to believe, that, by permitting a testator to bequeath what did not belong to him, they did not thereby mean that a testator might in conscience give away, or a legatee retain, a thing bequeathed, which belonged neither to the testator nor to his heir or executor. We add this last reflection because of the sentiment of some authors, who have been of opinion that the canon law condemns as unlawful all legacies of things belonging to other persons; which they found upon the decretal of the fifth chapter, *De testamentis*, although that decretal be only in a particular case, where the legatee, being in possession of the thing bequeathed, refused to give it back, pretending to found his right to the thing on the rule of the civil law, which had permitted the testator to bequeath it to him. No person could ever imagine that in such a case the legacy ought to divest the proprietor of his right. These are the words of that decretal: *Filius noster, F. conquestus est, quod quondam P. pater suus aliqua Ecclesiæ vestræ, sepulturæ suæ gratia, juris alieni reliquit. Et quidem leges hujus sæculi hoc habent, ut hæres ad solvendum cogatur si auctor ejus rem legavit alienam: sed quia lege Dei, non autem lege hujus sæculi vivimus, valde mihi videtur injurius, ut res tibi legata, quæ cujusdam Ecclesiæ esse perhibentur, a te teneantur, qui aliena restituere debuisti.* It is true, that the terms of this decretal seem to condemn in general the rule of

the civil law, as being opposite to the divine law; but seeing it is only with respect to the injustice of this legatee, and that a legacy conformable to the remark we have just now made, or to the case which shall be explained in the sixth article, would have nothing in it contrary to the divine law, it is necessary, in order to give to this decretal its proper and just meaning, to apply it rather to the bad use that one would make of the rule of the civil law, than to the rule itself.

IV.

3525. *A Testator may bequeath a Thing which he knows is not his own.* — If the testator knew that the thing which he bequeathed was not his own, the testamentary heir or executor will be bound either to give the thing itself to the legatee, if he can have it of the owner at a reasonable rate;[d] or if he cannot purchase it, or will not,[e] he must give the value of it. For the intention of the testator was, that the legatee should reap the benefit of the legacy. But it will not be presumed that the testator knew that what he bequeathed was not his own, unless this fact be proved; and it is the legatee that is to make proof of it, for he who is the demandant is obliged to establish his right.[f]

V.

3526. *The Legacy is Null if the Testator thought that the Thing he bequeathed was his own.* — If it is not proved that the testator knew that the thing which he bequeathed was not his own, the legacy will be null. For it is presumed that he gave it away only because he thought it was his own, and that otherwise he would not have charged his testamentary heir or executor with a legacy of this nature.[g]

VI.

3527. *Exception to the foregoing Rule.* — If the legacy of a thing which the testator took to be his own, and which was not so, had been given in favor of a near relation of the testator's, or of a person of that consideration that it would make it a duty in the testator to leave him such a legacy, it would have the effect that the

[d] § 4, *Inst. de leg.*; — *l.* 30, § *ult. D. de leg.* 3.
[e] *D.* § *ult. in f.*
[f] § 4, *in f. Inst. de leg.* See the following article.
[g] § 4, *Inst. de leg.*; — *l.* 36, *in f. D. de usu et usufr. leg.*

circumstances might demand. Thus, for example, if a testator had bequeathed to his widow, whom he left without an estate, the usufruct of some land or tenement which was not his own, and which he believed was his own, thinking that the said land or tenement was part of a succession that had fallen to him a little before his death, the testamentary heir or executor of this testator would be obliged to pay to the said widow an annuity to the value of that usufruct, or the usufruct itself, if he could agree for it with the proprietor at a reasonable price.[h]

VII.

3528. *If the Thing belongs to the Testamentary Heir or Executor, it is equal whether the Testator know or be ignorant of this Fact.* — If the thing bequeathed did belong to the testamentary heir or executor, it would be the same thing whether the testator knew or were ignorant of that fact, and the testamentary heir would be bound to acquit the legacy. For even although this testator had believed that the thing was his own, yet we ought not to presume in this case that, if he had known that it was not his own, he would not have bequeathed it, and would not have been willing to burden his testamentary heir with the procuring it some other way; since he might have very reasonably judged that it would be as easy for his testamentary heir to give that which was his own as that which should be a part of the inheritance. Thus, we ought to presume to the contrary, that he, having a mind to leave this legacy, would not have been diverted from doing it, although he had known that the thing belonged to his testamentary heir or executor.[i]

VIII.

3529. *If the Thing bequeathed belongs already to the Legatee, the Legacy is useless.* — If the thing bequeathed did belong to the legatee, the legacy would be null. For he could not acquire a new right to what was already entirely his own. And we ought to presume that, if the testator had known it, he would not have made such a disposition. Thus, it would remain always null, although it should afterwards happen that this legatee should alienate the thing that was bequeathed to him, and he could not so much as demand the value of it.[l]

[h] *L.* 10, *C. de legat.*

[i] *L.* 67, § 8, *D. de legat.* 2.

[l] § 10, *Inst. de legat.*; — *l.* 13, *C. eod.*

IX.

3530. *If the Legatee has acquired by a lucrative Title what was bequeathed to him, the Legacy will be Null.* — If after a testator had bequeathed a thing which was not his own, and which he knew was not his own, the legatee had acquired the property of it for a valuable consideration, as in a sale, the legacy would subsist, and the value of it would be due to the legatee; for he ought to reap the profit of the legacy. But if he had acquired the thing by a lucrative title, as by gift, or by another legacy from the proprietor thereof, the legacy of the testator, who was not owner of the thing bequeathed, would remain null, unless it should appear that his intention was that the legatee should have in this case, besides the thing itself, likewise its value. But if this intention was not very evident, it would be sufficient for the legatee to have without any charges the very thing which the testator intended to give him, although he came by it another way, since by that the intention of the testator would be accomplished.[m]

X.

3531. *A Legacy of the same Thing to the same Person by two Testators.* — If it should happen that two testators had bequeathed the same thing to one and the same person, and that by the effect of one of the two legacies the legatee had been made master of the thing bequeathed, he could not pretend by the other legacy to have the value of it. For the intention of both the testators would be fulfilled, since he would have that which both the one and the other had a mind to give him. But if he had received by one of the two testaments the value of the thing before he had the thing itself, which might afterwards come to him by the other legacy of the testator, who was master of it, he would have the benefit thereof, and the testamentary heir would be obliged to give it him.[n] For the value which he had already received would not discharge the testamentary heir of him who had bequeathed a thing which was his own; and it would not be just that this testamentary heir should reap the profit of the thing bequeathed.

XI.

3532. *Two Legacies of one and the same Sum are not two Legacies of the same Thing.* — We must not reckon among lega-

[m] § 6, *Inst. de legat.*; — *l.* 21, § 1, *D. de legat.* 3; — *l.* 88, § 7, *in f. D. de leg.* 2.
[n] § 6, *in f. Inst. de legat.*

cies of one and the same thing, those which consist in a like sum of money, or in a like quantity of those sorts of things that are given by number, weight, or measure; but only those where two testators happen to devise one and the same land or tenement, or other particular thing which is the same in substance. Thus, the legacies of the like sums of money to one and the same legatee in the testaments of two different persons, would have their effect: and if two testators had bequeathed each of them a pension, or alimony, to a legatee, either of the same or different sums, both the legacies would be due; for it was the intention of each of the two testators to give to the legatee a part of his goods. Thus, the legacy of the one would not hinder the effect of the legacy of the other. And it would be the same thing in the case of two annuities, or rents of another nature, if, the legatee having acquired one of them by a donation, or by some other title, the other should be afterwards left him by a testament.[o]

XII.

3533. *The Devise of a Land or Tenement in which the Testator has only a Share, is reduced to that Share.* — If a testator, having a land or tenement in common with another person, had devised the same, without mentioning his portion of it, but saying barely, that he devised the said land or tenement, the devise would have its effect only for the portion thereof that did belong to the testator. For it would be presumed that he meant only to give away the share that he had in the said land or tenement.[p]

XIII.

3534. *A Legacy to a Debtor of what he owes.* — A creditor may bequeath to his debtor all that he owes him, or a part of it. But this legacy, as all other legacies, does no prejudice to the creditors of the testator, who are preferred to all the legatees, as has been mentioned in the last article of the first section; and the debtor who is legatee for what he owes will not be discharged from his debt, unless there be goods enough in the inheritance to satisfy all the creditors of the testator, and likewise the Falcidian portion due to the testamentary heir, as shall be shown in the following title.[q]

[o] *L.* 87, *D. de legat.* 2.

[p] *L.* 5, § 2, *D. de leg.* 1.

[q] Liberationem debitori posse legari jam certum est. *L.* 3, *D. de liber. leg.* Omnibus debitoribus ea quæ debent recte legantur: licet domini eorum sint. *L.* 1, *D. eod.*

Remarks on the Preceding Article.

3535. It appears from the two texts cited, that it was a doubt in the Roman law whether a creditor could bequeath to his debtor that which he owed him. The doubt was founded, as appears by these words, *licet domini eorum sint*, upon this, that one cannot bequeath to a person what is already his, and that what is due by a debtor is still the debtor's, until he strips himself of it by paying it to his creditor. We make this remark only because of the difficulty which the reader might find in these texts. For as to the validity of such a legacy, who can doubt of it? But we must add on this subject one reflection more, which another text, relating to the manner in which a testator might discharge his debtor, seems to deserve. It is a law in which it is said, that if a creditor, being sick, had delivered into the hands of a third person the bond or obligation of the sum due to him by one of his debtors, charging the said person to give him back the said bond or obligation in case he should recover, and to deliver it up to the debtor in case he should die, and this last case happened, the heir or executor of the said creditor could not demand the said debt of the debtor.* It is to be remarked on this decision, that such a disposition would not be just, and ought not to be executed, except with several precautions, which divers circumstances might demand. For, in the first place, it would be null if it were made to defraud the creditors of a person who should give such an order. And secondly, since this disposition would be only a donation in prospect of death, it would be liable to be curtailed both for the Falcidian portion of the testamentary heir, which shall be treated of under the following title, and for the legitime or legal portions of the children. And it would likewise be subject to the diminution which the customs make of all dispositions made in prospect of death in favor of the heirs of blood. But although there should be no cause for diminishing or reducing the same, and the question were not only about the validity of such a disposition, yet the circumstances thereof might give rise to difficulties. Thus, for example, if we suppose that a creditor, to whom a rent was due, had deposited the engrossed copy of the deed, by which the rent was constituted, in the hands of a third person, that he might deliver up the same after his death to his debtor; seeing there would

* *L.* 3, § 2, *D. de liber. leg.*

be no other proof of this will of the deceased besides the declaration which the depositary should make of it, and that the title or deed by which the rent was constituted would remain entire, the original minute thereof being lodged in the hands of the notary public, the bare declaration of this depositary would not be sufficient to prove a disposition made in prospect of death, and to annul a debt, the title whereof would still be subsisting, and of which there would appear no discharge or acquittance. But if we suppose that the title by which this rent was constituted were an obligation of which there were no original minute, and that the heir or executor of this creditor had caused the same to be seized in the hands of the depositary before he had delivered it to the debtor, pretending to dispute the validity of such a disposition, or not agreeing that the deceased ever had such an intention; the question in such case would seem to depend on the circumstances of the sum, the goods of the deceased, the quality of the depositary, and other circumstances which might help us to judge whether the declaration of the depositary ought to supply the want of a disposition in prospect of death made according to form.

XIV.

3536. *The Legacy of what is due from one of two Persons who are indebted for the same Sum acquits only him to whom it is left.* — If a testator, to whom two debtors should be engaged each of them for the whole debt, bequeaths to one of the two that which he owes him, this legacy will acquit only that legatee, and the other will remain obliged for his portion. For although the legatee was bound for the whole debt, yet the legacy would have its entire effect by discharging him of his share of the debt, since he will not be anyways accountable for the portion of his fellow-debtor, who will owe that all alone.[r] But if these debtors were copartners, and it appeared that the intention of the testator was to annul the debt in favor of the company, the legacy would be common both to the one and the other.[s]

XV.

3537. *The Legacy of a Delay of Payment to a Debtor discharges him of the Interest for that Time.* — A testator may bequeath to his debtor a respite for the payment of that which he owes him.

[r] *L. 3, § 3, D. de liber. leg.* [s] *D. l. 3, § 4.*

And this legacy will have this effect, that the testator's heir or executor cannot for the time of that forbearance demand any interest. And much less could he pretend to costs and damages, if the debt were of such a nature as the default of payment might give a handle for such a demand.[t]

XVI.

3538. *In what Sense the Father, who is Guardian to his Son, may be discharged from giving an Account of his Administration.* — If a son, whose father had been his guardian, happening to die without children before the father had made up the account of his guardianship, had ordained by his testament that his executors, if he had named others together with his father, should not demand of him any account of his administration, this disposition would have its entire effect; for it was in his power to give nothing at all to these other executors. But if this testator had children to whom the grandfather ought to give an account, it would be reasonable to give to such a disposition the temperaments that equity might require, according to the circumstances, so as not to oblige the grandfather to so strict an account as might be required of another guardian, and likewise not to do any thing to the prejudice of the children, under pretext of the favor that ought to be shown to the grandfather.[u]

Remarks on the Preceding Article.

3539. It is to be remarked on the rule explained in this article that we have turned it in such a manner as to accommodate it to our usage. For we should not observe the rule, such as it is explained in the text quoted on this article. And if a father, who had had the tuition of one of his children, having also other children, had alienated the goods of the child whom he had under his tuition, and had gathered in some of his debts; he would be bound to give an account of them to his grandchildren, heirs to their father whose guardian he was, since it would not be just that his other children should have the profit of the goods of their brother to the prejudice of his children, their nephews.

3540. It may be observed in relation to the accounts of the administration which fathers may have of the estates of their chil-

[t] *L.* 8, § 2, *D. de liber. leg.* See the third article of the second section of *Interest, Costs, and Damages.*

[u] *L.* 28, § 3, *D. de liber. leg.*

dren, that by the disposition of some customs the fathers are tutors, guardians, or stewards to their children, and have the enjoyment of their revenues without being liable to give an account. But this is to be only of what the father may consume for his own use, but not of what he may alienate.

XVII.

3541. *A Legacy of a Thing laid in Pawn.* — If a testator bequeaths a thing which he had pawned to a creditor, the executor will be bound to pay the debt in order to redeem and deliver to the legatee the thing bequeathed, unless the words of the legacy, or other proofs, should make it appear that it was the intention of the testator to charge the legatee with the payment of the debt. But if the pledge had been sold for the debt by the creditor, the executor would be bound to give the value of it to the legatee, unless he should prove that the intention of the testator was that the legacy should be null in that case.[x]

Remarks on the Preceding Article.

3542. We have not put down in this article that which is said in the 5th section, *Inst. de legat.*, that the testamentary heir is not bound to redeem the thing bequeathed, except in the case when the testator knew that it was in pawn. For besides that it is always to be presumed that every man knows what is of his own act and deed, and that a debtor is not ignorant that he is indebted, and that his goods are mortgaged for his debts, whether he has laid any particular thing in pawn in the hands of his creditor, or has only mortgaged his goods in general; it may be remarked that in the first text cited on this article, and likewise in the beginning of the 57th law, *de legat.* 1, it is said that the legatee is not bound to redeem the thing bequeathed, although the testator was ignorant that it was in pawn, if we judge that, if the testator had known it, he would have left another legacy of equal value to that legatee. Thus, this presumption being always natural enough, it is also natural that the testamentary heir should redeem the thing that is bequeathed. To which we may add, that, by the second text cited upon this article, it would seem that the legatee is not bound to acquit the debt unless he be charged so to do by the testament;

[x] *L. 6, C. de fideic.;* — *l. 57, in f. D. de legat.* 1; — *v. l.* 15, *D. de dote præleg.;* — § 5, *Inst. de legat.* See the fifteenth article of the eleventh section.

and that, if he pays the debt, he may get himself to be substituted to the creditor, in order to recover from the testamentary heir what he shall have paid for redeeming his legacy. And, in a word, it may be said that according to our usage it can never happen that a legatee should be bound to redeem the thing bequeathed, unless the testator has obliged him to do it. For since, according to the texts that have been quoted, that burden lies on the testamentary heir, if the testator knew that the thing bequeathed was mortgaged, and that by our usage all mortgages are founded on titles or deeds which affect in general all the goods of the debtor, we ought always to suppose that the mortgage was known to the debtor. And in the case of a legacy of movables that have been pawned to a creditor, the testator can never pretend to be ignorant of that engagement. Thus, it is not likely that in our usage there should ever be occasion for a proof of the knowledge which the testator might have of the engagement of the thing bequeathed, these sorts of proofs being otherwise directly contrary to our usage. So that, excepting the case of an express will of the testator, which should oblige the legatee to redeem the thing bequeathed, it would seem that the burden of it ought always to lie on the testamentary heir.

XVIII.

3543. *One may bequeath Things that are not in Being.* — One may bequeath things which are not as yet in being, but which are to come; as the fruits that shall grow on such a ground, or the profit which shall be made of a certain commerce: and these sorts of legacies imply the condition that the thing thus bequeathed shall happen in its time, and they have their effect according to the event.[y]

XIX.

3544. *A Legacy of a certain Quantity of Corn to be taken out of a Crop, or out of a certain Place.* — If a testator had bequeathed a certain quantity of corn to be taken out of such a crop, or out of a granary, and the said quantity is not found there, the legacy will be restrained to the quantity that is there found.[z] But if the legacy were of a certain quantity of corn, without determining

[y] *L.* 17, *D. de leg.* 3; — *l.* 24, *D. de leg.* 1.
[z] *L.* 5, *D. de trit. vin. vel ol. leg.*; — *l.* 8, § 2, *D. de leg.* 2.

whence it should be taken, the said quantity would be due, although there were no corn in the inheritance,[a] in the same manner as a legacy of a sum of money, which would be equally due, whether there were any money in the succession, or whether there were none at all.[b]

XX.

3545. *An Indefinite Legacy of Movables.* — When a testator hath bequeathed movables, such as his hangings and other furniture of his house, or the movables of a country-house that serve for the management of a farm, this legacy will have the bounds or extent that the expression and intention of the testator may give to it. And if it appears that his intention was to give only what he had at the time of making the testament, what he shall happen afterwards to acquire will not be comprehended in the legacy. As, on the contrary, if it appears that the legacy is meant of the movables that shall be found at the time of his death, it will comprehend every thing that shall be then found which is of the nature of the things bequeathed.[c]

XXI.

3546. *The Legacy of a Thing specified as belonging to the Testator is Null, if the Thing is not found among his Goods.* — When a testator bequeaths a certain thing which he specifies as being his own, the legacy will not have its effect unless that thing be found extant in the succession. Thus, for example, if he had said, *I bequeath to such a one my watch*, or *my diamond ring*, and there were not found in the succession either diamond ring or watch, the legacy would be null.[d] But if he had said, *I bequeath a diamond ring*, or *a watch*, the legacy would be due, and would have its effect, as shall be explained in the following article.

XXII.

3547. *A Legacy of a Thing indetermined in its Kind, how it ought to be understood.* — One may bequeath not only a certain thing described in particular, as such a horse, such a watch, such a suit of hangings; but indefinitely and in general a horse, a suit

[a] *L.* 3, *D. de trit. vin. vel de legat.* [b] *L.* 12, *D. de legat.* 2.

[c] *L.* 28, *D. de instr. vel instr. legat.*; — *l.* 7, *D. de aur. arg.* See the thirteenth and fourteenth articles of the following section.

[d] *L.* 32, § 5, *D. de leg.* 2.

of hangings, a watch, or other things of the like nature. And seeing these sorts of things may be of different qualities in the same kind, if the legacy does not mark the price of them, or does not determine in particular what the thing bequeathed ought to be, whether there be several of that thing in the succession, or whether there be none at all; the executor or testamentary heir cannot give the worst, nor the legatee choose the best. But this legacy will be moderated according to the circumstances of the quality of the testator and of the legatee, and the other circumstances which may help to discover the intention of the testator,[e] pursuant to the rule explained in the tenth article of the seventh section of *Testaments*, and the others which shall be explained in the seventh section of the title of *Legacies*.

XXIII.

3548. *A Legacy of a Work to be done.* — One may bequeath, not only sums of money, rights, debts, and all other things, but likewise some work to be done; as if a testator charges his executor or testamentary heir to rebuild the house of some poor man, or to do some other work, whether for a public use or for some particular person.[f]

XXIV.

3549. *An Indefinite Devise of a Land or Tenement is Null, if the Testator has none.* — If a testator who had two or more houses had devised a house without determining by any circumstance which of his houses he had a mind to give, the devise would be good, and the executor or testamentary heir would be obliged to give one of the houses, according to the rules which shall be explained in the seventh section. But if this testator who had devised a house had none of his own, or if, having no lands, he had devised a land indefinitely, these devises would remain without any effect. For one could not know what the testator had meant; and it might be said that the testator himself did not know his own meaning, and that he jested with him to whom he left such a legacy.[g]

[e] *L.* 37, *D. de legat.* 1; — *l.* 110, *eod.* See the second and following articles of the seventh section. We must observe the difference between the case in this article, and that of a legacy which should give to the legatee the right to choose, which shall be explained in the fifth article of the seventh section.

[f] *L.* 49, § *ult. D. de legat.* 2.

[g] *L.* 71, *D. de leg.* 1.

SECTION IV.

OF ACCESSORIES TO THINGS BEQUEATHED.

ART. I.

3550. *Definition of Accessories.* — An accessory to a thing bequeathed is that which, not being part of the thing itself, has, nevertheless, such a connection with it, as that it ought not to be separated from it, and ought to follow it. Thus, the shoes and halter of a horse, and the frame of a picture, are accessories to them.[a]

II.

3551. *Two Sorts of Accessories.* — We may distinguish two sorts of accessories to things bequeathed: those which follow naturally the thing, and which are comprehended in the legacy, although they be not mentioned; and those which are not added to the legacy except by a particular disposition of the testator. Thus, the legacy of a watch comprehends the case of it, and the legacy of a house includes the keys thereof. Thus, on the contrary, the legacy of a house will not comprehend the movables that are in it, unless the testator have expressed the same.[b]

III.

3552. *How we distinguish that which is an Accessory to a Thing.* — There are accessories to certain things which are not separated from them, such as the trees planted in a ground: and these sorts of accessories follow always the thing bequeathed, if they are not excepted in the legacy. And there are accessories which, although separated from the things, yet follow them likewise, such as the harness of a set of coach-horses, and others of the like nature. There may be also a progression of accessories to accessories, such as precious stones set in the case of a watch. And lastly, there are certain things of which it may be doubted whether they be accessories to others or not. And this may depend on the disposition of the testator, and on the extent or bounds he gives to his legacies, as he sees good. Thus, there is no other general rule in

[a] Quæ rebus accedunt. *L.* 1, § 5, *depos.* Ut vestis homini, equo capistrum. *D.* §.
[b] See the articles which follow.

doubts concerning what ought to go along with the thing bequeathed as its accessory, besides the intention of the testator, whose expression, together with the circumstances and usages of the places, if there be any, may help us to judge what ought to be accounted accessory, and what not.[c] But if the disposition of the testator leave the thing in doubt, we may in every particular case judge of what ought to be comprehended in the legacy as accessory, and what not, by the particular rules on the several cases explained in the articles which follow.

IV.

3553. *Accessories to a House.* — If a testator devises a house without specifying any thing as to what he intends should be comprehended in the said devise, the legatee or devisee will have the ground, the edifice, and its dependencies, such as a court, a garden, and other appurtenances of the house, with the paintings in fresco, and other ornaments or conveniences, which, according to the expression of some customs, are fixed to the house with cramp-irons and nails, or with plaster, with intent that they should always remain there; for these sorts of things are of the nature of immovables. But there will be no movable comprehended in this legacy except the keys, and other things, if there were any, which, being of the like use, would be equally necessary.[d]

V.

3554. *The Edifice is an Accessory to the Ground, and likewise what is added to its Extent.* — If he who had devised by testament a land or tenement makes afterwards some addition to it, as if he adds any thing to its extent, or if he builds some edifice upon it, these augmentations become part of the ground, and go to the legatee, unless the testator hath otherwise ordered by his testament.[e]

VI.

3555. *Another Accessory of the same Nature.* — It would be the same thing in a devise of a particular estate in land, if the testator, after having devised it, had added to it new buildings, and

[c] *L.* 18, § 3, *in f. D. de instr. vel instrum leg.*

[d] *L.* 21, *D. de instr. vel instrum. leg* ; — *l. ult. D. de suppell. legat.*

[e] *L.* 10, *D. de legat* 2; — *l.* 44, § 4, *D. de leg.* 1; — *l.* 39, *D. de leg.* 2. See the seventh and eighth articles. See the fourteenth article of the sixth section of *Testaments.*

even new rights, or if he had purchased grounds in order to enlarge, either a park, or some other land or tenement belonging to the said estate. For all these sorts of augmentations would be accessories that would follow the devise, either because of their nature of accessories, or because it could not be presumed that the testator intended to separate these sorts of things, in order to leave them without the land to his executor or testamentary heir.[f]

VII.

3556. *How that which is added to the Land that is devised belongs or does not belong to the Devisee.* — If the legacy were of one entire estate in land, and if after the making of the testament the testator had added to it some lands adjoining, this augmentation might belong either to the devisee or to the testamentary heir, according as the said new purchase might be considered as an accessory to the legacy, or as being wholly independent of it. For if, for example, it were a purchase of a parcel of land made with a view to make a field square, or to serve as a place to draw water from for the use of other grounds, or for some other service, or even as an addition only to the land devised, these acquisitions would be accessories that would go with the legacy or devise, in the same manner as that which should be found to be naturally added to it by some change made by the course of an adjoining river. But if the land that is purchased, and which borders on the land that is devised, were of a different nature from that which is devised, such as a meadow joining to a vineyard which the testator had devised; or if the land acquired by the testator were equally contiguous to the land devised by him, and to another land which the testator had left to his executor; these sorts of acquisitions would not be accessories to the legacy, unless we should be obliged to judge otherwise by the disposition of the testator, and the circumstances which might explain his intention.[g]

VIII.

3557. *An Augmentation of the Land devised which hath the Effect to revoke the Devise.* — If a testator, who had devised a land, builds afterwards upon it, this accessory to the land will go

[f] This is a consequence of the preceding article.

[g] *L.* 24, § 2, *D. de leg.* 1; — *l.* 10, *D. de leg.* 2. It appears by these texts, that these augmentations of the land are meant of that which is added by the testator, with intent to make it a part of the land that is devised.

with the land to the legatee, unless it should appear that the testator intended to revoke the legacy, as has been said in the fifth article. And if, for example, a testator, having devised a place in a town to build in, afterwards builds a house in it; or if, having devised a garden, orchard, or other place, he builds in it a summer-house or lodge; these buildings under these circumstances will belong to the legatee. But if he had built in a ground which he had devised either a house or other conveniences necessary for a farm to which he had joined the said ground, giving the said farm to another legatee, or leaving it to his heir or executor, it would be judged, from the use of the said building, that he had revoked the legacy.[h]

IX.

3558. *The Devise of a Ground comprehends the Service necessary to the said Ground from another Ground that is Part of the Inheritance.* — If, for the use of a ground of which the testator had devised the usufruct, the service of a passage through another ground of the inheritance were necessary, the executor or other legatee to whom the ground that ought to be subject to the service does belong would be obliged to suffer it. For the legatee ought to enjoy the ground subject to the usufruct in the same manner as it was enjoyed by the testator who took his passage through his own ground: and this accessory is such, that it is the intention of the testator that it should follow the legacy.[i]

X.

3559. *A Reciprocal Service between the Legatees of Two Contiguous Houses.* — If a testator, who had two houses joining to one another, devises one of them to one legatee, and the other to another, or devises one of them, and leaves the other to his heir or executor; the partition-wall of these two houses, which had for its

[h] *L.* 44, § 4, *D. de leg.* 1. The circumstances mentioned in the article show clearly enough the change of the will of the testator.

[i] *L.* 15, § 1, *D. de usufr. legat.* Although this text speaks only of the service that is necessary to the legatee of a usufruct, yet the same equity would require that this service should be likewise given to the legatee of the property. And the presumption of the testator's intention would be the same in this legacy as in the other, since it cannot be supposed that he intended to make a fruitless devise, and seeing this devise could not have its use without this service, which changes nothing in the use that the testator himself made of his own lands, in making one ground to serve for the necessary passage to another.

sole owner the testator, will become common to the two proprietors of these two houses. Thus, the reciprocal service on this common wall will be as an accessory which will follow the legacy.[l]

XI.

3560. *The Legatee ought to have the Use of the Thing bequeathed.* — If, of two houses belonging to a testator, whereof one is left to the heir or executor and the other given to a legatee, or both are given to two legatees, one of them could not be raised higher without taking away the light of the other, or damaging it very much; the executor or legatee who should chance to have the first house could not raise it but in such a manner as that there should remain for the other house so much light as should be necessary for the use of it. For it was not the testator's intention that either his executor or this legatee should render the legacy of the other house useless.[m]

XII.

3561. *The Movables of Houses, whether in Town or Country, are not Accessories to them.* — The legacy of a house in the town does not comprehend the movables that are in it, unless they are expressly added by the testator. Nor does the legacy of a house in the country take in what movables may be in it that are necessary for cultivating the lands, and for gathering in the harvest.[n] But this legacy comprehends the things that are fixed to the building, such as in certain places presses and tubs.[o]

XIII.

3562. *In what Manner Accessories to a Country-House are understood.* — The legacy of a country-house, together with what shall be found in it necessary for cultivating the lands, and gathering in the harvest, comprehends the movables which may serve for these uses.[p] And if there be any doubt as to the extent which this legacy ought to have, it must be interpreted by the presumptions of the testator's intention, which may be gathered from the words of the testament, and from the circumstances; and we may likewise make use of what lights can be had from the usage of the places.[q]

[l] *L.* 4, *D. de servit. leg.*
[m] *L.* 10, *D. de servit. præd. urb.*; — *d. l. in f.*
[n] *L.* 2, § 1, *D. de instr. vel instrum. legat.*
[o] *L.* 21. *eod.*
[p] *L.* 12, *D. de instr. vel instrum. legat.*
[q] *L.* 18, § 3, *in f. eod.*

XIV.

3563. *The Legacy of a House with its Movables.* — If a testator had devised a house with all its movables, this legacy would comprehend all the movables that were in it destined for the furniture of the said house; such as beds, hangings, pictures, tables, chairs, and other things of the like nature. But if there should be found in it hangings, or other movables, laid up and destined either for sale, or for the use of another house, the legatee would have no right to them.[r] And if, on the contrary, some movables of this house should chance to be somewhere else at the time of the testator's death, as if a suit of hangings had been lent out, or given to be mended, whatever were out of the house upon such an account would nevertheless be comprehended in the legacy.[s]

XV.

3564. *Papers are not comprehended in a Legacy of all Things found in a House.* — If in the legacy of a house the testator had comprehended in general and indefinite terms every thing that should be found in the said house at the time of his death, without excepting any thing; this legacy, which would comprehend all the movable things, and even the money,[t] would not comprehend the debts owing to the testator, nor his other rights, the deeds or titles whereof should be found in the said house. For the debts and rights do not consist in the papers which contain the deeds or titles of them, and have not their situation in a certain place.[u] But their nature consists in the power which the law gives to every one to exercise them. Thus the deeds or titles are only the proofs of the rights, and not the rights themselves.

XVI.

3565. *The Accessory may be a Thing of much greater Value than that whereof it is an Accessory.* — The accessories which ought to follow the thing bequeathed are judged to be such only by the use

[r] *L.* 44, *D. de leg.* 3. [s] *L.* 86, *eod.*

[t] *L.* 44, *D. de leg.* 3; — *l.* 32, § 2, *D. de usu et usuf. et red. leg.* It follows from these texts, that this legacy would comprehend the money, if it were not excepted.

[u] *L.* 86, *D. de leg.* 2. Debts and other rights have not a situation in a certain place, and are not comprehended in places as things corporeal are. We may remark this distinction between rights and other things in a law which speaks of it on another occasion. Quod si nec quæ soli sunt sufficiant, vel nulla sint *soli pignora*, tunc pervenietur etiam ad *jura*. *L.* 15, § 2, *in fine*, *D. de re jud.* We see by this text the distinction between rights and things corporeal.

that is made of them, and not by their value: so that the accessory is frequently of a much greater value than the thing itself to which it is accessory; and it goes, nevertheless, to the person to whom the thing is bequeathed. Thus, for example, precious stones set in the case of a watch are only an ornament and an accessory to it, and yet they follow the legacy of the watch.[x]

SECTION V.

OF LEGACIES OF A USUFRUCT, OR A PENSION, OR ALIMONY, AND OTHER THINGS OF THE LIKE NATURE.

3566. We have not put down in this section the rule of the Roman law by which it is ordered, that, if a testator had bequeathed a usufruct to a town or other corporation, it should last a hundred years. And seeing we have explained in another place[a] the reason why we have not thought proper to insert this rule among the others, it is not necessary to repeat it here.

Art. I.

3567. *A Legacy of a Usufruct.* — When a testator bequeaths a usufruct, or the enjoyment of a house or other tenement, the condition of the legatee will be the same as of other usufructuaries, and his enjoyment will have the same extent and the same bounds. And he will likewise be liable in the same manner for the charges of the houses or lands of which he has the usufruct. Thus we may apply to this legatee the rules relating to usufruct, which have been explained in the title of the said matter.[a]

II.

3568. *A Legacy of a Usufruct to several Persons, and of the Property to one of them.* — If a testator had devised to two or more legatees the usufruct of a house or lands, and the property thereof to the survivor of them, this legacy would regard all the legatees in two manners; for it would be pure and simple with regard to all of them as to the usufruct, and conditional likewise in respect of them all as to the propriety; every one of them

[x] *L.* 44, *D. de ædil. ed.*; — *l.* 6, § 1, *D. de aur. arg. mund.*

[a] See the end of the preamble of the title of *Usufruct.*

[a] See the title of *Usufruct.* See the ninth article of the preceding section.

being called to the propriety thereof upon condition of their surviving the others.[b]

III.

3569. *The Usufruct of Movable Things.* — Since one may bequeath the usufruct of movable things,[c] if a testator had bequeathed to his wife the usufruct or enjoyment of his house, and of all the things that should be found in it at the time of his death, excepting the gold and silver, and there were in the said house merchant-goods in which the testator traded, and which he kept there for sale, this usufruct would not comprehend these sorts of things.[d] For it would be restrained to that which should appear to be destined to be kept in the said house.

IV.

3570. *How the Legacy of a Portion of the Fruit subsists after the Land is sold.* — If a testator had bequeathed a portion of the produce or income of a certain land or tenement, and the executor should afterwards sell the said land, the legacy would nevertheless subsist. And it will be regulated not on the foot of the same portion of the interest of the price of the sale, but according to the value of that portion of the fruits, whether it exceed the said interest, or fall short of it. For the legacy was of that which the said portion might be worth every year. Thus this change shall hurt neither the executor nor the legatee.[e]

V.

3571. *The Burden on a Legacy of a Usufruct passes to the Executor, if the Legacy does not take Place.* — If the legatee of a usufruct had been burdened by the testator with a fiduciary bequest to some other person, and the said legatee either could not or would not accept the legacy, the heir or executor who should reap the benefit of the legacy would be obliged to satisfy the said fiduciary bequest. For although this bequest regarded only the person of the legatee because of his usufruct, and the said usufruct does not subsist any longer; yet the enjoyment of the thing bequeathed, which was burdened with this fiduciary bequest,

[b] *L.* 11, *D. de reb. dub.*
[c] See the third section of *Usufruct.*
[d] *L.* 32, § 2, *D. de usu et usufr. leg.*
[e] *L.* 21, *D. de ann. legat.*

does not go to the testamentary heir or executor but with this charge.[f]

VI.

3572. *The Difference between an Annual Legacy, and a Legacy of a Usufruct.* — One may bequeath a certain sum of money, or a certain quantity of corn, or other things, by way of pension, to be paid every year to the legatee, either during a certain time, or during his life. And there is this difference between a legacy of this nature, and a legacy of a usufruct, that in this last the legatee has an uncertain enjoyment, and may have either more or less, or sometimes nothing at all; and that an annual legacy of a certain quantity is always the same. There is also this difference between these two kinds of legacies, that whereas the legacy of a usufruct is only one legacy of a right to enjoy always, as long as it shall last, an annual legacy contains as many legacies as it may last years. For every year the legatee ought to receive of the executor the revenue which is bequeathed him. Thus this legacy is, as it were, conditional, and implies the condition that the legatee should be living at the beginning of every year, in order to have right to the legacy, and to transmit the right of that year to his heir or executor.[g]

VII.

3573. *Another Difference.* — There is likewise this difference between the legacy of a usufruct and an annual legacy, that a legacy of a usufruct cannot be perpetual, because it would annul the right of property; but an annual legacy may be perpetual, whether it be in favor of a corporation or of the heirs of some family.[h]

VIII.

3574. *Another Difference.* — There is also this other difference between these two kinds of legacies, that if the lands which are subject to a usufruct should produce nothing, the right of the usufructuary would be of no use. But the legacy of a certain quan-

[f] *L.* 9, *D. de usu et usufr. leg.*

[g] *L.* 4, *D. de ann. leg.* See the following articles. See, as to what is said at the end of this article concerning the transmission of an annual legacy, the ninth article; and as for the usufruct, there is no transmission of it, for it perishes by the death of the usufructuary. See the first article of the sixth section of *Usufruct*, and the fourth article of the first section of the same title, and the remark there made upon it.

[h] *L.* 22, *C. de leg.*

tity of corn, wine, or other things, is altogether independent of what may be reaped in the harvest or vintage. And even although such a legacy were assigned to be taken out of the crop of every year, it would nevertheless be due in a year when there was no crop, provided that the other years could supply the said deficiency, and that the intention of the testator were not contrary thereto.[i]

IX.

3575. *An Annual Legacy is acquired at the Beginning of the Year.* — Annual legacies accrue to the legatee when the year begins; and although he dies as soon as the year is begun, yet the legacy for that whole year is due.[l] For it is natural that a legacy which is in lieu of a fund for a maintenance should be acquired beforehand.

X.

3576. *A Legacy that is payable in several Years is of another Nature than an Annual Legacy.* — We must not reckon in the number of annual legacies a legacy of a certain sum that is made payable every year until a certain time, for some other cause than that of a maintenance or alimony, no more than a legacy of a sum made payable at several terms of several years. For these payments being thus divided only to lessen the charge of the executor, these legacies would be of the same nature with others, and as one single legacy, of which the entire right would accrue to the legatee at one and the same time. So that this legatee happening to die before these years were expired, he would transmit to his heir or executor the annual payments that should remain due.[m]

XI.

3577. *How we are to judge whether a Legacy of a Sum of Money to be distributed on a certain Day be perpetual, or only for one single Time.* — If a testator had left a legacy of a charity to be given on a certain day, or of a sum of money to be distributed, either to the canons of a chapter, or to the ecclesiastics of such a parish, or to some other such like use, upon some festival or so-

[i] *L.* 17, § 1, *D. de ann. leg.*; — *l.* 13, *D. de trit. vin. vel ol. leg.*

[l] *L.* 1, *C. quando dies leg. vel fid. ced.*; — *v. l.* 5, *D. de ann. leg.*; — *l.* 12, *D. quando dies leg. ced.* See the sixth article.

[m] *L.* 20, *D. quand. leg. ced.*

lemnity which should return every year, as on a saint's day, or on some festival of some of the mysteries of religion, without mentioning expressly that the said charity or dole should be reiterated every year on the said day, we should judge by the circumstances whether the intention of this testator was to leave a legacy of a sum to be paid only for one single time, or to be paid yearly at the return of the said day. Which would depend on the quality of the person, on the largeness of his estate, on the words of the testament, on the motive of the legacy, on the fund set apart for the said charity or dole, and on the other circumstances which might help us to judge of the intention of this testator.[n]

XII.

3578. *Legacies of Alimony are for Life.* — Legacies of alimony, or of a maintenance, last during the life of a legatee, unless the testator has limited the time. For alimony, and a maintenance, left indefinitely, not being restrained to a certain duration of time, are for the whole time that the legatee shall stand in need of them, which comprehends his whole life.[o]

XIII.

3579. *A Legacy of Alimony to the Years of Puberty is understood to be meant of full Puberty.* — Seeing a legacy of alimony, or of a maintenance, is altogether favorable, if a testator had devised such a legacy to last only until the legatee should attain the age

[n] Cum quidam decurionibus divisiones dari voluisset die natalis sui: Divi Severus et Antoninus rescripserunt, non esse verisimile testatorem de uno anno sensisse, sed de perpetuo legato. *L.* 23, *D. de ann. leg.*

Attia fideicommissum his verbis reliquit, quisquis mihi hæres erit, fidei ejus committo, uti det ex reditu canaculi mei et horrei, post obitum, sacerdoti, et hierophylaco, et libertis, qui in illo tempore erunt, denaria decem die nundinarum quas ibi posui. Quæro, utrum his duntaxat qui eo tempore quo legabatur, in rebus humanis, et in eo officio fuerint, debitum sit, an etiam his, qui in locum eorum successerunt? Respondit, secundum ea quæ proponerentur, ministerium nominatorum designatum, cæterum datum templo. Item quæro, utrum uno duntaxat anno decem fideicommissi nomine debeantur, an etiam in perpetuum decem annua præstanda sint? Respondit, in perpetuum. *L.* 20, *eod.*

Although these texts seem not to make the perpetuity of a legacy of this kind to depend on the circumstances, yet it appears evidently that the legacies there mentioned are declared to be perpetual only because of the circumstances which result from the quality of the said legacies, according to the usage of those times. And as for the usage with us, it is hardly possible that such a doubt should happen; for a testator who should leave a perpetual legacy of the nature of these explained in the article would not fail to express it, and to assign a fund for a charge of this kind.

[o] *L.* 14, *D. de alim. vel cib. leg.*

of puberty, it would not end till he had attained the age of full puberty, that is, eighteen years complete in males, and fourteen in females.[p]

XIV.

3580. *A Legacy of Alimony comprehends Clothing and Lodging.* — A legacy of maintenance, or barely of alimony, comprehends food, raiment, and lodging, unless the testator shall have set some bounds to it; for one cannot live without clothes and lodging. But this legacy does not comprehend that which relates to the instruction of the legatee, either for a trade, or some profession, or for his learning at school. For these wants are of another nature, and are not so necessary as food, clothing, and lodging.[q]

XV.

3581. *Legacies of Alimony are regulated according to the Circumstances.* — If a testator had bequeathed alimony or a maintenance indefinitely, without specifying any thing, and if he had been wont to maintain the person to whom he had left this legacy, it would be regulated on the same foot: if not, it would be fixed either at a certain sum of money yearly, or a certain quantity of necessaries to be paid in specie, and in proportion to the quality of the legatee, the quality of the testator and of his estate, the consideration which the testator might have had for the person of this legatee, either out of affection to him or because of some duty or other tie, and according to the other circumstances which might help us to judge of the intention of the testator,[r] as has been said in another place.[s]

XVI.

3582. *How a Legacy of Alimony which the Testator had been used to give in his Lifetime is regulated.* — If he who always gave alimony or a maintenance to a person leaves him a legacy of what he was wont to give him, and it does appear that he gave him differently, sometimes more, and sometimes less; the legacy will be regulated upon the foot of what he gave the last time imme-

[p] *L.* 14, § 1, *D. de alim. vel cib. leg.* See, touching these two sorts of puberty, the remark on the eighth article of the second section of *Persons*.

[q] *L.* 6, *D de alim. vel cib. leg.*; — *l.* 7, *eod.*; — *l. ult. eod.*

[r] *L.* 22, *D. de alim. vel cib. leg.*

[s] See the twelfth article of the sixth section of *Testaments*.

diately preceding his death, whether he had given more before that time, or less.[t]

XVII.

3583. *A Legacy of Alimony is due, although the Legatee have been maintained some other Way.* — Although legacies of alimony, or maintenance, be destined for the diet, clothing, and lodging of the legatee, yet if the testamentary heir does not furnish them to the legatee, and he have them somewhere else, and even gratis, this testamentary heir, or his heirs or executors if he were dead, would nevertheless be accountable for the arrears to the said legatee. And the cessation of payment for several years would be of no manner of prejudice to him, either for the time past or the time to come. For although the motive of the testator was barely that the legatee should be maintained, and he has had his maintenance, yet this was a charge that the testator imposed on his testamentary heir; and on his part it would be unjust that he should reap the benefit of it, as it is just on the part of the legatee, that he should have the advantage both of the bounty of this testator, and of the liberality of other persons who had nourished and maintained him, or of his own industry, if he had lived by that.[u]

XVIII.

3584. *Legacies of Alimony are favorable.* — Legacies of alimony are distinguished from the greater part of other legacies, by the consideration of the necessity that renders them so favorable, that one may bequeath alimony even to persons that are incapable of other legacies, as has been said in its place.[x] And if a legacy of alimony or maintenance, or of a yearly pension, were made in favor of poor persons, it might be ranked in the number of legacies to pious uses, which are the subject-matter of the ensuing section.

[t] *L.* 14, § 2, *D. de alim. vel cib. leg.*
[u] *L.* 10, § 1, *D. de alim. vel cib. leg.*; — *l.* 18, § 1, *eod.*
[x] See the sixth article of the second section.

SECTION VI.

OF LEGACIES TO PIOUS USES.

ART. I.

3585. *What are Legacies to Pious Uses.* — Legacies to pious uses are those legacies that are destined to some work of charity,[a] whether they relate to spiritual or temporal concerns. Thus, a legacy of ornaments for a church, a legacy for the maintenance of a clergyman to instruct poor children, and a legacy for their sustenance, are legacies to pious uses.

II.

3586. *Difference between Legacies to Pious Uses, and other Legacies, by their Motives and their Use.* — We may make this a first difference between legacies to pious uses, and the other sorts of legacies, that the name of legacies to pious uses is properly given only to those legacies which are destined to some work of piety and charity, and which have their motive independent of the consideration which the merit of the legatees might procure them;[b] whereas the other legacies have their motives confined to the consideration of some particular person, or are destined to some other use than to a work of piety or charity, as shall be shown in the article which follows.

III.

3587. *Difference between a Legacy to Pious Uses, and a Legacy which regards the Public Good.* — All legacies which have not for their motive the particular consideration of some person are not, for all that, of the number of legacies to pious uses, although they be destined for a public good, if that good be any other than a work of piety or charity. Thus, a legacy destined for some public ornament, such as the gate of a city, for the embellishment or conveniency of some public place, and others of the like nature, or a legacy of a prize to be given to the person who should excel others in some art or science, would be legacies of another nature than those to pious uses.[c]

[a] Dispositiones pii testatoris. *L.* 28, *C. de episc. et clér.*

[b] It is in this motive that the essential part of legacies to pious uses does consist.

[c] *L.* 117, *D. de leg.* 1; — *l.* 122, *eod.*

IV.

3588. *A Legacy to a Pious Use, without any Particular Destination, how to be applied.* — If a legacy to pious uses was not destined to any particular use, as if a testator had left a legacy in general, either to the church, or to the poor; the legacy to the church would be for the parish church of the place where the testator lived; and the legacy to the poor would be for the hospital of that place, if there were any: if there were no hospital, the legacy would go to the poor of that parish. And it would be the same thing, if, instead of a bare legacy, the testator had instituted for his testamentary heirs the church or the poor.[d]

V.

3589. *Execution of Legacies to Pious Uses.* — If the testator himself had not directed particularly the application of a legacy to pious uses, as if he had left a legacy to the poor indefinitely in a place where there were no hospital; or for the redemption of captives, without specifying in what place; the execution of these dispositions would depend on the executor of the testament, or other person to whom the testator had explained and intrusted his intention. And if there were no person to whom he had imparted his will, and it were not safe to trust to the integrity of the testamentary heir, the ordinary judge would give directions therein, at the instance of the persons whose duty it should be to see these legacies duly applied.[e]

REMARK ON THE PRECEDING ARTICLE.

3590. What is said in the text cited, that, if the testator has named nobody for the execution of his legacies to pious uses, the bishop of the place may demand the sum bequeathed, in order to

[d] Si quis in nomine magni Dei et Salvatoris nostri Jesu Christi hæreditatem, aut legatum reliquerit, jubemus, ecclesiam loci illius, in quo testator domicilium habuerit, accipere quod dimissum est. *Nov.* 131, *c.* 9. It appears by this text, that it was the usage of those times to leave legacies to God. And if such a legacy ought to belong to the church of the place, with much more reason ought a legacy that is left to the church indefinitely to belong to the testator's parish church.

[e] Si quidem testator designaverit per quem desiderat redemptionem fieri captivorum, is qui specialiter designatus est, legati vel fideicommissi habeat exigendi licentiam: et pro sua conscientia votum adimpleat testatoris. Sin autem persona non designata, testator absolute tantummodo summam legati vel fideicommissi taxaverit, quæ debeat memoratæ causæ proficere: vir reverendissimus episcopus illius civitatis ex qua testator oritur habeat facultatem exigendi quod hujus rei gratia fuerit derelictum, pium defuncti propositum sine ulla cunctatione, ut convenit, impleturus. *L.* 28, § 1, *C. de episc. et cler.*

execute the intention of the testator, is not altogether conformable to our usage. For the bishop may indeed take care that the legacies left to the poor be duly applied, but it is not he himself that demands and receives the sums appropriated to these sorts of legacies. And if it be necessary to sue the executor at law, this function will belong to the persons who are charged with this care, such as the governors of a hospital or an almshouse, according as these legacies happen to be destined. And if the legacy were not appropriated to any particular house, as a legacy of an alms to be distributed on a certain day in a certain place, which were not applied to any particular hospital, or a legacy to the poor in a place where there were no house allotted for them, the officers of justice would be obliged to give directions therein at the instance of the king's procurators. Which does not hinder the bishops and curates from doing their diligence on their part to procure the execution of these sorts of legacies. We may consult on this subject the ordinances which have provided for the recovery, preservation, and administration of the goods belonging to the poor.*

VI.

3590½. *Destination of a Pious Legacy to another Use than that which the Testator had appointed.* — If a pious legacy were destined to some use which could not have its effect, as if a testator had left a legacy for building a church for a parish, or an apartment in a hospital, and it happened, either that before his death the said church or the said apartment had been built out of some other fund, or that it was noways necessary or useful, the legacy would not for all that remain without any use; but it would be laid out on other works of piety for that parish, or for that hospital, according to the directions that should be given in this matter by the persons to whom this function should belong.[f]

* See the edict of 1561, the ordinance of *Moulins*, art. 73, that of *Blois*, art. 65 and 66, and that of *Melun*, art. 10.

[f] Legatum civitati relictum est, ut ex reditibus quotannis in ea civitate memoriæ conservandæ defuncti gratia spectaculum celebretur, quod illic celebrari non licet. Quæro quid de legato existimes? Modestinus respondit: cum testator spectaculum edi voluerit in civitate, sed tale, quod ibi celebrari non licet: iniquum esse hanc quantitatem quam in spectaculum defunctus destinaverit, lucro hæredum cedere. Igitur adhibitis hæredibus, et primoribus civitatis, dispiciendum est, in quam rem converti debeat fideicommissum, ut memoria testatoris alio et licito genere celebretur. *L.* 16, *D. de usu et usuf. et red. leg.*

Although this text relates to another sort of dispositions, yet the rule that results from it is with much more reason very just in legacies to pious uses.

VII.

3591. *Privilege of Legacies to Pious Uses.* — Since legacies for works of piety and charity have a double favor, both that of their motive for holy and pious uses, and that of their utility for the public good, they are considered as being privileged in the intention of the law.[g]

SECTION VII.

OF LEGACIES OF ONE OF SEVERAL THINGS, AT THE CHOICE OF THE EXECUTOR, OR OF THE LEGATEE.

3592. We have endeavoured to form the rules which compose this section in such a manner as that they may reconcile some contrarieties, at least such in appearance as we meet with, in some laws relating to this matter. Thus, for example, it is said in one law, that if a testator hath bequeathed in general a man, that is to say, a slave, the legatee shall have the choice of the person: *Homine generaliter legato, arbitrium eligendi quem acciperet, ad legatarium pertinet. L.* 2, § 1, *D. de opt. vel el. leg.* And it is said in another law, that if a testator hath bequeathed in general a silver basin, he having several, and not distinguishing which basin he intends to give, the testamentary heir will have it in his choice to give which basin he pleases. *Sed etsi lancem legaverit, nec apparuerit quam, æque electio est hæredis quam velit dare. L.* 37, *in fine, D. de leg.* 1.

3593. It would seem by these texts, that whoever should take both the one and the other in a literal sense might think it indifferent in point of law whether the election were given to the testamentary heir or to the legatee, which certainly cannot be just; but in order to reconcile them together, it is necessary to observe a distinction of the ancient Roman law between legacies which were called *per vindicationem*, and those that were called

[g] See the sixth article of the eighth section, and the remark on the fourth article of the second section of *Codicils*.

The favor of legacies to pious uses may distinguish them from other legacies in the cases mentioned in the places which we have just now quoted; and, in general, this favor may be considered in the cases relating to the interpretation of any disposition for a legacy to a pious use.

See, concerning this subject of privileges of legacies to pious uses, the preamble to the second section of the *Falcidian Portion*.

per damnationem, of which mention hath been made in another place.[a] In the legacies of the first sort, the legacy being conceived in these or the like terms, *I will that such a one take a horse out of my stable*, the legatee had the choice, for he himself took the thing that was bequeathed to him. And it is of a legacy of this kind that we are to understand the first of the texts which have been now quoted. And in the legacies of the second kind, the legacy being conceived in these terms, *I will that my heir give to such a one one of my horses*, the testamentary heir made the choice, for it was he that was charged to give the thing that was bequeathed.[b] And it is of a legacy of this second kind that we are to understand the second text. Thus, although the differences of these two sorts of legacies, and of some others, of which it would be to no purpose to speak here, have been abolished,[c] yet it is necessary to make use of them for conciliating the contrarieties of these, and of many other laws, which have very much perplexed several interpreters, and that not without reason. And we may likewise say of these two kinds of legacies, which were thus distinguished in the Roman law, that their different expressions may point out some difference in the intention of the testator; and that that expression which gives to the legatee the right to take seems to have a greater relation to the right of choosing than that which charges the testamentary heir to give to the legatee.

3594. We have been obliged to make this reflection on a difficulty which it was necessary to clear up before we should proceed to explain the rules relating to this matter. But seeing in our usage there is only one manner of expression used by testators, which has no relation to any one of these two sorts of legacies that were distinguished in the Roman law, and that almost all legacies are conceived in these terms, *I give and bequeath to such a one*, or, if it is in the name of a third person, *gives and bequeaths;* these expressions mark nothing at all of the intention of the testator that favors either the testamentary heir or the legatee. Thus, unless the legacy be conceived in such a manner as to leave the choice either to the one or to the other, it must be interpreted according to the rules that have been explained in the sixth, seventh, eighth, ninth, tenth, and eleventh articles of the seventh section of *Testaments*. And since it is not proper to repeat in this

[a] See the preamble of the ninth section of *Testaments*.

[b] *V. Ulp. tit.* 24, § 14.

[c] § 2, *Inst. de legat.*

section what has been said in those articles, the reader may have recourse to them, and join them here.

ART. I.

3595. *Three Manners of bequeathing one out of several Things.* — One may bequeath one of two or more things in three manners: for one may leave such a legacy without making mention of the choice. As if a testator bequeaths simply a horse to be taken from among those in his stable, a picture to be taken out of those in his closet; and one may leave the choice either to the legatee or to the executor.[a]

II.

3596. *Of Legacies where no Mention is made who shall have the Choice.* — If a testator bequeaths a thing to be taken out of several of the same kind that shall be found in this succession, or even that are not part of the succession, and does not express to whom the choice shall belong, whether to the executor or to the legatee, this legacy will depend on the rule explained in the twenty-second article of the third section of this title, and on the rules which follow.[b]

III.

3597. *If the Expression of the Testator determines the Choice, we must hold to that.* — If the expression of the testator is conceived in such terms as to make us judge, that, although he has not given the choice either to the executor or to the legatee, in a legacy of one out of two or more things, his intention was to bequeath one of them rather than the other; the legacy will be understood of that thing to which the testator's expression shall have a greater relation than to the other, whether it be of more or less value. Thus, for example, if a testator had bequeathed his saddle-horse, having several of that kind, the legacy would be understood of the horse which the testator himself was wont to ride. Thus, for another example, if he who had two houses, one in Paris, in which he himself dwelt, and the other at St. Dennis, occupied by a tenant, had left a legacy in these terms, *I give and bequeath my house to such a one;* this expression would determine the legacy to be meant of

[a] See the following articles.

[b] See the twenty-second article of the third section of this title, and the tenth article of the seventh section of *Testaments*. See the following rules.

the house in which the testator lived, unless it should appear by the circumstances that his intention was to bequeath the other. But if the expression of the testator should not determine particularly for any one of the two houses, as if he had barely devised one of his houses, or if, having two lands called by the same name, he had devised one of them, the executor might give only the house or the land that is of least value;[c] for by that he will have satisfied the legacy. And in general, in all doubts of this nature, where nothing determines to one of the things which are comprehended in a legacy, the presumption is for the executor, as has been explained in another place.[d]

IV.

3598. *A Legacy left to the Choice of the Executor.* — If a testator had bequeathed a silver basin, having several of that sort, the executor would be at liberty to give which silver basin he pleased.[e] For the legatee would have that which was left him, and this is a consequence of the rule explained in the third article. And the executor would with much more reason have this liberty if the testator had left the choice to him. But if the legacy were of things which, although of the same kind, might be of different qualities, good or bad, such as horses, hangings, the liberty of choosing, which the executor would have, would not extend to a power of choosing a suite of old hangings that are falling to pieces, or a horse that is broken-winded. For it could not be presumed that the testator had given this extent to the right of election which he had left to his executor.[f]

V.

3599. *A Legacy left to the Choice of the Legatee.* — When a testator gives to the legatee the right of choosing out of several things, such as the horses in his stable, any of them which he pleases, and in like manner of other things, the legatee has the liberty to choose the most precious of them.[g] And to put the legatee in a condition to make this choice, the executor is obliged to

[c] *L.* 37, § 1, *D. de leg.* 1;—*l.* 39, § 6, *D. de leg.* 1.

[d] See the sixth, seventh, and other following articles of the seventh section of *Testaments.*

[e] *L.* 37, *in f. D. de leg.* 1.

[f] *L.* 110, *D. de leg.* 1. See the twenty-second article of the third section, and the eighth and tenth articles of the seventh section of *Testaments.*

[g] *L.* 2, *D. de opt. vel elect. leg.*

show all that there is in the inheritance of that kind of thing of which the election is bequeathed. And if there should be any which by some chance, without the act of the executor, had not appeared, the legatee, who, without knowing any thing of them, had made his choice, might choose anew after he came to the knowledge of them.[h] But if among all these things there should be any one that was singularly necessary to the executor for matching some other goods of the succession, it would be equitable to except it out of the choice of this legatee, especially if the executor is willing to make up to the legatee what this necessary thing should exceed the others in value, if none of the others be found of an equal value to it. For the right of the legatee does not extend so far as to put it in his power to hurt the executor.[i]

VI.

3600. *A Legacy left to the Choice of a Third Person.* — If the testator had left to a third person the choice of the thing bequeathed, either because he did not think the legatee capable of making the said choice, or because he was willing to make use of that temperament between the interests of the executor and of the legatee, the legacy would be fixed by that third person. And if he should fail or refuse to determine it, the right of election would go to the legatee, who might demand of the executor such of the things as he should pitch upon, providing it were not the most precious of all, but a thing of middle value between that which were most precious and that of least value.[k] And in case they could not agree among themselves, the election would be determined by the arbitration of some person whom they themselves should agree on, or who should be named by the judge.[l]

[h] *Ll. 4 et 5, eod.*

[i] As the executor or testamentary heir ought not to abuse the liberty of election, as has been said in the preceding article, so neither ought the legatee to abuse it when he has it. Homine legato, actorem non posse eligi. *L. 37, D. de leg. 1.* See the tenth article of the seventh section of *Testaments*.

[k] *L. ult. § 1, C. comm. de legat.*

[l] Arbitri officium invocandum est. *L. 13, in f. D. de servit. præd. rust.* The delay of a year, mentioned in the first of these two texts, would not be agreeable to our usage nor to equity. For seeing this third person who should put off so long the making of this choice was named only that he might make a reasonable choice, and that others can do it as well as he, it would not be just to wait so long a time till he should be pleased to determine the matter, especially if the thing bequeathed were of such a nature as to be in hazard of perishing during the delay.

VII.

3601. *He who has the Choice ought not to defer it.* — When the testator hath given power to choose, whether it be to the executor or to the legatee, he who ought to make the choice cannot put it off any longer time than what the condition of the things shall make necessary, or what shall have been regulated by the testator, or by mutual consent of the parties, or even by the judge, if the matter cannot be otherwise settled. And he who has the choice in his power, if he delays to make it, may be sued by the other, who may cause him to be summoned in order to make his option, and may protest for his costs and damages because of the delay; which would have the effect that shall be explained by the following rules.[m]

VIII.

3602. *Penalty when the Executor defers to make the Choice.* — If the executor to whom the choice was left was in delay, and in the mean while the things of which one was to be given to the legatee should happen to perish, or to suffer damage, he would be liable to make good the loss or diminution to which his delay had given occasion. For the legatee might have perhaps been able to sell the thing, or prevent its perishing or being damaged; and if, the things being still in being, the legatee had suffered damages because one of them was not delivered to him, the executor would be accountable for the same.[n] But if some of the things of which the choice was to be made were not present, and that too long a delay would be prejudicial to the legatee, he might oblige the executor either to choose for him one of the things that were present, or to give him the value of one of the things that were absent.[o]

[m] Mancipiorum electio legata est. Ne venditio quandoque eligente legatario interpelletur, decernere debet prætor, nisi intra tempus ab ipso præfinitum elegisset, actionem legatorum ei non competere. *L.* 6, *D. de opt. vel elect. leg.*; — *l.* 8, *eod.*

What is said in this and the other articles which follow, concerning the delay of the executor or of the legatee, is to be understood of the cases where there has been a citation of the party to come and make his choice, or where there appears to be some knavery in the delay; as, for example, if an executor should keep up and conceal for some time a testament or codicil in which he was charged with a legacy left to his own choice.

[n] See the text cited upon the preceding article, which may agree as well to the delay of the executor as to that of the legatee.

[o] *L.* 47, § 3, *D. de leg.* 1.

IX.

3603. *Penalty when the Legatee defers to make the Choice.* — If the choice belongs to the legatee, and he puts it off, he will be liable for the costs and damages which may have been occasioned by his delay, in the same manner as the executor is liable for the consequences of his delay. Thus, for example, if two horses, one whereof (whichsoever he should choose) had been left him by legacy, should happen to die during his delay to make his option, and that the said loss might be imputed to him, because the executor, who had no occasion for any of the horses, and might have been able to sell the horse which the legatee would have left him, and would not have been obliged to keep both the horses, might recover against this legatee costs and damages for that expense and that loss, according to the circumstances.[p]

X.

3604. *If there remain only one of the Things whereof the Choice was bequeathed, it belongs to the Legatee.* — If after the death of the testator, and before the election, whether it were to be made by the legatee or by the executor, the things of which the election was to be made should happen to perish, without the fault either of the one or the other, one of the things is lost to the legatee, and the others to the executor.[q] But if there remains only one of them, it belongs to the legatee. For although his legacy was of a right to choose, and there is now no room left for choice, yet the intention of the testator was that the legatee should have one of them; and therefore he ought to have that which is the only one that remains.[r]

XI.

3605. *If, after the Choice is made, the Thing chosen perishes, the Legatee bears the Loss of it.* — If after that he who was to choose,

[p] See the text cited on the seventh article, in which these words are to be remarked: Ne venditio quandoque eligente legatario interpelletur.

[q] The first part of this article may have its use in a case where the testamentary heir were to deduct the Falcidian portion. For one would not reckon to him as part of his Falcidian portion the value of that thing which the legatee was to have, but only the other things which were to have been his own. See the seventh and eighth articles of the first section of the *Falcidian Portion*.

[r] Whether the choice belongs to the executor or to the legatee, if there remains only one, it goes to the legatee. For this event determines the thing that remains to be the legatee's, as much or rather more than the choice would do that which should be chosen.

whether it was the executor or the legatee, has made and declared his choice, the thing chosen should happen to perish, the loss of it would fall upon the legatee, and he would have no right to those things that should remain. For the choice had distinguished that thing which he was to have, and had made it his own. So that it is he who ought to bear the loss of it.[s]

XII.

3606. *He who has made his Choice cannot change and make another.* — The executor or legatee, who has once made his option, whether judicially or extrajudicially, by mutual consent, cannot afterwards change or make another choice. For the right of choosing, which the testator had given him, is consummated by this first choice.[t]

XIII.

3607. *The Choice cannot be made before the Executor has accepted the Succession.* — The legatee who has the right of choosing cannot make his choice till the executor has accepted the succession. For till then, there being no executor, there would be no party to whom he could intimate his choice, and who could either contest it or approve it, and deliver the legacy. So that it would be to no purpose that he had made his choice.[w]

XIV.

3608. *The Legatee of what shall remain after the Choice of another will have all, if no Choice is made.* — If a testator had bequeathed one or two things out of many at the choice of one legatee, and the remainder of them to another, and he who had this choice would not make use of his right, all the things would belong to the second legatee, and the executor would have none of them. For the expression of those things that should remain after the choice of the first of the two legatees would comprehend them all, if he took none of them.[x]

[s] Stichum aut Pamphilum, utrum hæres meus volet Titio dare: si dixerit hæres Stichum se velle dare, Sticho mortuo liberabitur. *L.* 84, § 9, *D. de leg.* 1.

Although this text speaks only of the case where the choice belongs to the heir or executor, yet the rule is with much more reason just in the case where the legatee has himself made the choice.

[t] *L.* 84, § 9, *D. de legat.* 1; — *l.* 20, *D. de opt. vel elect. leg.*; — *l.* 5, *D. de legat.* 1; — *l.* 11, *in f. D. de legat.* 2.

[w] *L.* 16, *D. de opt. vel elect. legat.*

[x] *L.* 17, *D. de opt. vel elect. leg.*

XV.

3609. *The Right of Election passes to the Heir or Executor of the Legatee.* — If the legatee who had a right to choose dies without having made a choice, he transmits to his heir or executor both his right to the legacy and the right of election.[y]

SECTION VIII.

OF THE FRUITS AND INTEREST OF LEGACIES.

3610. By fruits of legacies we are to understand, not only the product of lands, but likewise all other sorts of revenues or profits that may be made of any other thing. And by interest is meant the reparation of damages which debtors of sums of money, who fail to make payment, owe from the time of the demand, as has been explained in the title of *Interest.*

3611. As to the fruits of lands devised, it is necessary to distinguish between those which are upon the ground at the time that it is delivered to the legatee, and which are commonly called the fruits hanging by the root, and those which have been separated from the ground by the executor before he delivered it, and which were separated only after the death of the testator. These are the subject-matter of this section, as also the interest and other revenues that were fallen due before the delivery of the legacy; and the fruits hanging on the ground at the time of the delivery are, as it were, accessories, which have been treated of in the fourth section.

ART. I.

3612. *Three Sorts of Things that may be bequeathed.* — We may distinguish into three kinds all the things which testators have the liberty to give away in legacies. The first is of those which of their own nature produce no revenue; such as a watch, a picture, silver plate. The second is of those things which of their own nature produce a revenue; as a house, a meadow, or other ground, a herd of cattle, hackney-horses to those who let them out to hire, and other things of the like nature. The third is of sums of

[y] *L.* 19, *D. de opt. vel elect. leg.* See the tenth and following articles of the tenth section of *Testaments*, and the seventeenth article of the ninth section of this title of *Legacies.*

money, which of their own nature produce nothing, but which, making the price of every thing that is in commerce, are the instrument of the commerce itself: which is the reason why the laws condemn those who are dilatory in paying the sums which they owe in damages, which they have fixed to what is called interest, of which mention has been made in its proper place.[a] And we may place in this third rank all the legacies which are reduced to a valuation, such as a legacy which a testator should make of some work, or other thing that he should oblige his executor to do for a legatee, or a legacy of a thing which the executor could not give in specie; for in this case he would owe the value of it.[b]

II.

3613. *If the Testator has regulated the Fruits and Revenues of the Legacy, his Will will serve as a Rule.* — If a testator had regulated by his disposition what concerns the fruits or other revenues which the thing devised may produce, his will must serve as a law, and the executor will be accountable or not accountable for them, according as the testator shall have ordered. Thus, he who devises a land may order it to be delivered either after the harvest is over, or after some years, during which space of time he leaves the enjoyment of it to his executor.[c]

III.

3614. *The Fruits of Legacies are due only from the Time they are demanded.* — If the testator has ordered nothing about the fruits and other revenues which the things devised might produce, they will be due only from the time that they are demanded. But if the executor had dealt any way knavishly, as if he had concealed the testament, he would be liable, not only for all the fruits from the time of the testator's death, but likewise for costs and damages, if there had been any.[d]

[a] See the title of the *Loan of Money and other Things to be restored in Kind.*

[b] See the sixth article of the first section of the same title of the *Loan of Money and other Things to be restored in Kind.* Ubi quid fieri stipulemur, si non fuerit factum, pecuniam dari oportere. *L.* 72, *D. de verb. obl.*

[c] *L.* 5, *C. de necess. serv. hæred. inst.* See, touching the interest of money, the fourth article.

[d] In legatis et fideicommissis fructus post litis contestationem non ex die mortis consequuntur, sive in rem sive in personam agatur. *L. ult. C. de usur. et fructib. legat. seu fideicom.*; — *l.* 1, *eod.*

Is qui fideicommissum debet post moram, non tantum fructus, sed etiam omne damnum quo affectus est fideicommissarius, præstare cogitur. *L.* 26, *D. de leg.* 3; — *l.* 23, *D.*

Remarks on the Preceding Article.

3615. It is necessary to observe on this article a difficulty which ought not to be suppressed. For, besides that it has divided the interpreters, it requires that some necessary reflections should be made on the rule explained in this article. This rule discharges the executor, not only from the interest of money, and of other things which produce no revenue, but likewise from the fruits of lands and tenements which produce a revenue, and obliges him to make restitution of these fruits only after a legal demand. And seeing it makes no exception, it comprehends not only the cases where the executor and the legatee should have equally knowledge of the testament, and where the legatee should neglect to demand his legacy, but also the cases where, the legatee being ignorant of his legacy, the executor who should know of it, and see that he was obliged to deliver the thing devised, should nevertheless retain it; which seemed to those interpreters to be contrary to equity. For it cannot be said, especially in the Roman law, that the things devised are a part of the goods of the inheritance, and may be considered as belonging to the testamentary heir until the time of their being delivered; seeing it is a principle of the Roman law in the matter of legacies, that the propriety of the thing bequeathed belongs to the legatee from the moment of the testator's death; and although the legatee know nothing of his right till a long time after, yet his acceptance of the legacy has this effect, that he is accounted to be master of the thing bequeathed from the moment of the testator's death, and that he is so much master of it, that it is said in a law that the thing bequeathed passes to the legatee in the same manner as the goods of the inheritance pass to the testamentary heir, and that the testamentary heir never had any right to them.[a]

de leg. 1; — *ll.* 8, 39, *D. de usur.* See the tenth article of the first section of *Substitutions* direct and fiduciary, and the fifteenth article of the second section of the same title.

We have not put down in the article that the fruits are due from the contestation of suit, as it is said in the first of these texts; but that they are due from the time of the demand. For by our usage, and by the ordinances, a legal demand hath the effect of the contestation of suit in the Roman law. See the remark on the fifth article of the first section of *Interest.*

We have added to the article the exception of the case of knavery in the executor. For this rule cannot be contrary to the general rule, which obliges every knavish possessor to make restitution of the fruits, with much more reason than him who is backward in paying what he owes after it has been demanded of him. See the fourth article of the third section of *Interest.*

[a] *L.* 86, § 2, *D. de leg.* 1; — *l.* 64, *in f. D. de furt.*; — *l.* 80, *D. de legat.* 2.

3616. It would seem to follow from these first reflections, that, since the fruits belong regularly to the proprietor of the ground, those of a ground devised did belong to the legatee or devisee from the death of the testator; and that the testamentary heir who was not ignorant of the testament, having known that he was in possession of goods that were not his own, ought to be obliged to restore those fruits. These reasons could not be unknown to those who framed the laws cited on this article; and what still augments the difficulty is, that Justinian has made an exception from the rule explained in this article in favor of legacies to pious uses, having ordained, with respect to these sorts of legacies, that no inquiry should be made whether the legacy had ever been demanded, but that it should suffice that, the testamentary heir not having delivered the legacy, he should be reckoned guilty of delay *ipso jure*, that is to say, by the effect of the law itself.[b]

3617. To resolve this difficulty, some of those interpreters have been of opinion, that it was necessary to restrain the laws, which discharge the testamentary heir from the fruits until the time of a legal demand, to the case of a legacy of a thing that was not the testator's own; but these laws are conceived in too clear terms to admit of so remote a sense. Others say that their meaning is, that the testamentary heir is not accountable for all the fruits which the legatee might have reaped by his industry, and that he is only liable for those which he has really and truly gathered; but this distinction does not suit with these laws, and does not remove the difficulty. There are some who think that these laws are to be understood of the fruits which had been gathered before the death of the testator, and not of those which have been gathered since his death; but what right could the legatee pretend to the fruits which accrued to the testator in his lifetime? Others will have it, that the testamentary heir is obliged to restore the fruits reaped after his entering to the possession of the inheritance, and not those reaped before; but these laws discharge the testamentary heir from the restitution of the fruits without any distinction; and his right of enjoyment takes in the fruits preceding his entering to the inheritance, for they belong to him, and he recovers them from those who had gathered them. So that his condition ought to be the same as to the fruits of both these

[b] See the last article.

times. And lastly, there are some who have thought it necessary to distinguish between the legacies which are called *per damnationem*, and the legacies *per vindicationem*, of which mention has been made in the preamble to the foregoing section; that in these the fruits are due to the legatee from the time of the testamentary heir's entering to the succession; and that in those they are due only from the time that the testamentary heir has been guilty of delay. But there would be as much, or more, reason to give to the legatee the fruits from the time of the testator's death in the case of a legacy *per damnationem*, seeing in this case the testamentary heir who was charged to deliver the thing bequeathed would be more faulty than he would be in the case where the legatee himself ought to take the thing bequeathed to him; and besides, the distinction of these two sorts of legacies hath been abolished, as has been remarked in the same place. It seems likewise that the first of the texts cited on this article relates to both these sorts of legacies indifferently, and that these two expressions, *sive in rem, sive in personam agatur*, may be understood, the one of the legacy *per damnationem*, which the legatee demanded by a personal action, and the other of the legacy *per vindicationem*, which was demanded by a real action. Whence it appears to follow, that, even when the distinction of these two sorts of legacies was in use, the rule explained in this article was equally applicable to the one sort and to the other.

3618. We relate here the several sentiments of those interpreters, to show that this rule which discharges the testamentary heir or executor from the fruits of legacies until the time of a legal demand, seemed to them to be unjust, being taken in a literal and general sense. But seeing none of all these interpretations appears to agree with the sense of these laws, the terms whereof are so clear and distinct, and that the exception which Justinian has made from this rule in favor of legacies to pious uses determines for the sense which discharges in general the testamentary heirs or executors from the fruits of legacies until the time of demand; it is but fair and ingenuous freely to own, that Justinian's intention, and that of the preceding laws, was to make a general rule of it, which, after the manner of other general rules, should be observed in cases where there were no cause to make any exception from it. Thus Justinian hath excepted from this rule legacies to pious uses. Thus one may except the cases where the executor should be guilty of any roguery. And if, for example, an executor had

concealed a codicil which contained legacies, he would be, without doubt, condemned to make restitution of the fruits and interest of those legacies, if the said codicil came to light. But when no unfair dealing can be imputed to the executor, and it was not his fault that the legatees had no knowledge of the testament, and had not received their legacies, the circumstances might justly discharge the executor from making restitution of the fruits which he had enjoyed. Thus, for example, if a testament having been opened in a court of justice, or deposited with a notary public living in the place where the testator had his abode, and it having by that means been known and made public, there were some of the legatees whose place of abode was unknown, or even whose persons were not known, or who were absent in a remote country, so that it was not possible to acquaint them; the executor who on one part ought to continue in possession of the goods, and to take care of them, and who on the other part ought to remain proprietor of what cannot be acquired by the legatees, whether it be that they cannot or will not receive their legacies, or that they are incapable of them, may without injustice remain in possession of all the goods of the inheritance, and enjoy those that had been bequeathed as well as the other goods. So that his enjoyment of those things not being a usurpation, and since it may have some other good foundation besides the negligence of the legatee, it is but just that the executor under these circumstances should be free from any fear of being afterwards called upon to make restitution of the fruits which he had enjoyed without any fraud or covin. Thus the rule which frees him from this restitution hath its equity founded in the circumstances which may clear him from all roguery; and it hath likewise its usefulness for the public good, because of the inconveniences which it removes of an infinite number of difficulties that would happen if executors were obliged without distinction to restore all the fruits which they had gathered since the death of the testator. And seeing the delay of payment of legacies may happen, either through the roguery of the executor, or without any knavish dealing on his part, and that such knavery ought not to be presumed without proof, it was but just to presume uprightness and integrity in an executor who should have several excuses to allege. But this law being founded only on the presumption of the integrity of the executor, and on the consequences of the public good, which demands that all occasions of lawsuits should be cut off as much as is possible, it would

be altogether useless for justifying the conscience of an executor, who, although nobody should be able to discover and prove his roguery, ought to tax himself with it, and, if he would do justice upon himself, ought to restore the fruits which he had unjustly reaped of a land or tenement that was devised, and which he might have delivered to the devisee.

IV.

3619. *The Interest of Legacies of Money is due only from the Time of the Demand.* — Legacies of money, and other things which of their nature produce no revenue, ought to be paid, as all other legacies, at the time appointed by the testament; or if there be no time fixed, they are due after the death of the testator. But although they be not acquitted at the time appointed, yet interest is only due from the time of the demand;[c] unless the testator had ordered that the legatee should have the interest.[d]

V.

3620. *Profit of Legacies, which is of another Nature than the Fruits or Interest.* — If the thing bequeathed were of such a nature as that it ought to produce to the legatee profits of another sort than the fruits of the ground, or interest of money, as if it were a certain number of mares, or a set of instruments and machines for some manufacture, the executor who is in fault for not delivering the legacy will be accountable for the profits which these sorts of things might yield. But if the legacy were of a stud of mares, the colts would be a part of the legacy, and would belong to the legatee, although the executor had not been guilty of any delay in delivering the same.[e]

VI.

3621. *The Fruits and Interest of Legacies to Pious Uses are due without any Demand.* — The executor who does not pay the legacies to pious uses within the time regulated by the testator, if he has set any time, or within the delay that is necessary according to the quality of the testator's disposition, will be accountable for the fruits, the interest, and other revenues, according to the nature

[c] *L.* 1, *C. de usur. et fruct. legat.*

[d] The interest in this case would not be usurious; for it would not be a loan, but the liberality of the testator, which would increase the legacy.

[e] *L.* 26, *D. de legat.* 3; — *l.* 8, *D. de usur.*; — *l* 39, *eod.*

of the thing bequeathed, to reckon from the term, if there was any set by the will, or from the death of the testator, if there was no term fixed.[f]

Remark on the Preceding Article.

3622. Although the justice of this rule be founded, not only on the favor of legacies to pious uses, but also on this particular consideration, that these legacies may be unknown or neglected by the persons who ought to call for them, such as the governors of a hospital, and others who happen to be intrusted with this care; yet this is not always precisely observed, lest such a strictness should happen sometimes to degenerate into rigor. And it is even prudent for governors of hospitals not to exact legacies to pious uses in such a manner as to make them uneasy and burdensome to families. For such a rigid conduct as this might some time or other divert those who were injured by it from making the like dispositions in favor of hospitals, and incline them to dispose to some other uses of what they had piously designed for the poor.

SECTION IX.

How the Legatee acquires his Right to the Legacy.

3623. It has been remarked at the end of the preamble to the tenth section of *Testaments*, where the right of transmission is treated of, that mention should likewise be made of it in this place in some articles relating to this right. But what shall be said in these articles ought not to be taken for a repetition of what has been said in that tenth section of *Testaments*. For there we have explained the rules of transmission in general, and here we shall only make application of those rules to some cases where it is necessary to show their use.

Art. I.

3624. *The Legatee acquires his Right at the Instant of the Testator's Death.* — Seeing the legatee acquires his right by a testament, or other disposition made in consideration of death, and

[f] *L.* 46, §§ 4 *et* 5, *C. de episc. et cler.*; — *v. Nov.* 131, c. 12.

that these sorts of dispositions are confirmed, and have their effect at the moment of the death of the person who has made the disposition, the right to the legacy is acquired to the legatee at the same instant,[a] unless it be that the will of the testator has made some change to it; and that depends on the rules which follow.

II.

3625. *Legacies of Two Sorts, either Pure and Simple, or Conditional.* — We must distinguish two sorts of legacies: those which are pure and simple, that is to say, whose validity does not depend on any condition: and those which are conditional, and which have not their effect but by the event of the condition on which they depend; as if a testator devises a certain estate in land, on condition that the legatee happens to have children.[b] And the right to these several legacies accrues differently to the legatees by the following rules.

III.

3626. *The Pure and Simple Legacy is acquired at the Moment of the Death of the Testator.* — If the legacy was pure and simple, the legatee acquires his right to it at the moment of the death of the testator, whether he knew or was ignorant of the testament and the said death. And if the thing devised be a house or lands, or some movable thing belonging to the inheritance, or any other thing that is actually among the goods of the succession, it passes directly from the deceased to the legatee, and he is master of it, and the executor has no manner of right to it.[c] Or if it be a thing that is not part of the succession, or a sum of money, he has a right to have it delivered to him at the time that the executor shall be obliged to deliver it.[d]

IV.

3627. *As also the Conditional Legacy, the Condition whereof is fulfilled before the Testator's Death.* — If, a legacy being condi-

[a] Si purum legatum est, ex die mortis dies ejus cedit. *L.* 5, § 1, *D. quand. dies leg. vel fid. ced.* Hæredis aditio moram legati quidem petitioni facit, cessioni diei non facit. *L.* 7, *eod.* See the tenth article of the tenth section of *Testaments*.

[b] Purum legatum. *L.* 5, § 1, *D. quand. dies legat. vel fideic. ced.* Legatum sub conditione relictum. *D. l.* § 2.

[c] *L.* 5, § 1, *D. quand. dies leg. vel fideic. ced.*; — *l.* 80, *D. de legat.* 2; — *l.* 75, § 1, *eod.*; — *l.* 64, *in f. D. de furt.*; — *l. ult. C. quand. dies leg. vel fideic. ced.*; — *l.* 3, *eod.*

[d] See the tenth section.

tional, the condition was come to pass in the lifetime of the testator, or at the time of his death, this event would make the conditional legacy to become pure and simple; so that the legatee would acquire his right to it at the time of the testator's death.[e]

V.

3628. *If the Condition does not happen till after the Testator's Death, the Legacy hath not its Effect till it happens.* — If the condition comes to pass only after the death of the testator, the right of the legatee will not vest in him at the time of the said death, even although the condition should depend on his own act, and he should offer to perform it, unless the executor should accept his offer. But the legacy will not be due to him till after he shall have actually fulfilled the condition, or, if it was independent of his act, till it shall have come to pass.[f]

VI.

3629. *Three Sorts of Legacies necessary to be distinguished for the Effect of the Right of the Legatee.* — It is necessary to distinguish three sorts of legacies, with regard to the time at which the legatee may have acquired his right, and to the time in which he may exercise the said right: the legacies that are pure and simple without any term, the legacies that have a certain term, and the legacies that are conditional. And this difference hath the effect that shall be explained by the rules which follow.[g]

VII.

3630. *Difference between the Time when the Legacy is acquired, and the Time when it may be demanded.* — In all sorts of legacies it is necessary to distinguish two several effects of the right of the legatee. One, which renders him master of the thing bequeathed, whether he may demand immediately the delivery of it, or may not demand it as yet; and the other, which puts him in a condition to demand the delivery of it. It is of this first effect that it is said, that then the time is come in which the legatee's right vests in him, and the legacy is due. And it is of the second effect that it is said, that then the time is come when the legatee may demand the legacy. Thus, when the legacy is pure and simple,

[e] See the sixteenth article of the eighth section of *Testaments*.

[f] *L.* 5, § 2, *D. quand. dies leg. vel fideic. ced.*; — *l. un.* § 7, *C. de caduc. toll.*

[g] See the following articles.

and without any term, the moment of the death of the testator hath both these effects; and the time is then come in which the right to the legacy vests in the legatee, and in which likewise he may demand the thing bequeathed. Thus, when there is a term prescribed for the payment of the legacy that is pure and simple, the first of these two effects comes to pass on the day of the testator's death; and the second does not happen till the day of the term. Thus, when the legacy is conditional, and without any other term, it hath these two effects at the moment that the condition comes to pass; or if it has a term, the second effect is suspended until the said term. And if the condition is not come to pass, the time is not come in which the right to the legacy is acquired, and much less the time of demanding it.[h]

VIII.

3631. *The Legatee transmits or doth not transmit the Legacy to his Heirs or Executors, according to the Condition in which his Right is when he dies.* — It follows, from the preceding articles, that if the legatee chances to die before he has received the thing bequeathed, the legacy may pass, or may not pass, to his heirs or executors, according to the condition in which his right is at the time of his death. And he transmits the legacy if the right to it was vested in him, or he does not transmit it if the time was not come that the legacy was due to him.[i]

IX.

3632. *Two Cases in which there can be no Transmission.* — Of what nature soever the legacy be, if the legatee was dead at the time of making the testament, or if he dies before the testator, his heir or executor will have no right to the legacy. For the legatee himself could have no right to it but at the time of the testator's death, which was to give the effect to his testament.[j]

X.

3633. *The Conditional Legacy is not transmitted if the Condition be not come to pass.* — If the legacy is conditional, and the legatee dies before the condition of the legacy be fulfilled, he dies without

[h] *L.* 9, *D. ut legat. seu fideic. caus. caveat*; — *l.* 21, *D. quando dies leg. vel fideic. ced.*; — *l.* 213, *D. de verb. signif.*

[i] *L.* 5, *D. quand. dies leg. vel fideic. ced.*; — *l.* 1, § 2, *D. de condit. et demonstr.*

[j] See the fifth article of the tenth section of *Testaments*.

having had any manner of right to the legacy: so that he transmits no right to his heir or executor.[m]

XI.

3634. *The Legacy is transmitted, although the Legatee die before the Term of paying the Legacy.* — When the legacy is pure and simple, whether there be a term fixed for payment of it, or whether there be no term fixed, the legatee who has survived the testator, having thereby acquired his right to the legacy, transmits it to his heir or executor, whether he die before or after the term.[n]

XII.

3635. *Which are the Legacies that are truly Conditional.* — We must not reckon in the number of conditional legacies all those in which the testator may, perhaps, have made use of the word *condition*. For, as it has already been observed in its proper place, conditions are often confounded with the charges which testators impose on legacies, which renders this word *condition* equivocal.[o] But we ought not to call any legacies conditional, except those whereof the validity depends on a condition, so as that until it be accomplished the legatee can have no manner of right.[p] Thus, for example, if a testator bequeaths a sum of money in case the legatee be married at the time of the testator's death, or that he have children, or that he be provided of an office, these are conditional legacies, although the word *condition* be not expressed in the testament. But if the testator devises a land or tenement, on condition that the legatee suffer therein a service for the use of other lands or tenements which he devises to some other person, this expression will indeed impose upon the legatee the charge of this service, but it will not make the legacy conditional; and if the legatee dies before the right of service have been put in use, the legacy will nevertheless be transmitted to the heir or executor of the said legatee.

XIII.

3636. *The Legatee who leaves his Wife big with Child transmits*

[m] See the eleventh article of the tenth section of *Testaments*.

[n] See the texts cited on the seventh and eighth articles of this section, and the third article of the tenth section of *Testaments*.

[o] See the seventh and following articles of the eighth section of *Testaments*.

[p] See the same articles, as also the second article of this section.

the Legacy left him on Condition that he have Children. — If the condition of a legacy were, that the legatee should have children, the testator having ordered that when he should have children the executor should give him either a sum of money or a certain house or land, and the said legatee should die without having children, but should leave his wife big of a child that should afterwards be born, this legacy would have its effect; and this legatee would have transmitted his right to his heir. For his heir would be this child, whom the testator had in view when he made his testament, and whose birth had accomplished the condition.[q]

XIV.

3637. *Indecent or impossible Conditions do not suspend the Legacy.* — If the testator had made the legacy to depend on a condition that was either unjust, indecent, or impossible, seeing this condition would be of no manner of obligation, as has been shown in its proper place, this legacy would be of the nature of a pure and simple legacy, and the legatee happening to die before he received it would transmit his right to his heir or executor.[r]

XV.

3638. *Legacies left to an uncertain Time are Conditional.* — *Example.* — Legacies whose effect depends on an uncertain time, that is, of which there is no certainty that it will ever happen, are of the same nature with conditional legacies. For they imply the condition that they shall not have their effect unless the said time comes to pass. So that if the legatee of a legacy of this nature should chance to die, the said time not being as yet come to pass, he would not transmit the legacy to his heir or executor. Thus, for example, if a testator had left a sum of money to a legatee in case he should arrive at the age of majority, this legatee happening to die before he attained the age of majority, his heir or executor would have no right to the legacy.[s]

[q] *L.* 18, *D. quand. dies legat. ced.*; — *l.* 20, *D. ad senat. Trebell.*

[r] *L.* 5, §§ 3 *et* 4, *D. quand. dies leg. ced.* See the eighteenth article of the eighth section of *Testaments.*

[s] Si cui legetur cum quatuordecim annorum erit: certo jure utimur, ut tunc sit quatuordecim annorum, cum impleverit. *L.* 49, *D. de legat.* 1.

Non putabam diem fideicommissi venisse, cum sextumdecimum annum ingressus fuisset, cui erat relictum, cum ad annum sextumdecimum pervenisset. Et ita etiam Aurelius Imperator Antoninus ad appellationem ex Germania judicavit. *L.* 48, *D. de condit. et dem.*; — *v. l.* 74, § 1, *D. ad senat. Trebell.*

Remark on the Preceding Article.

3639. We must take notice, that we have added to the texts quoted on this article the citation of the 74th law, § 1, *D. ad senat. Treb.*, because it is contrary to them. For whereas it is said in these texts, that if a legacy or fiduciary bequest be left to a person when he shall have fourteen years of age, or, as it is expressed in the second text, when he shall attain the age of fourteen, the legacy will not be due until these years are completed; it is said in that other law that it suffices that they be begun. It is true that that is in a case where the circumstances made this decision favorable; but it is, however, the same expression explained in two different senses. In our usage, this expression, *when he shall arrive at such a year*, or, *when he shall attain to such a year*, seems to be meant of the year begun. But this other expression, *when he shall have attained the age of majority*, is not equivocal, and demands majority, which is not acquired but by the five-and-twentieth year being complete. For which reason we have made use of this expression in the article, that we might not say any thing contrary to any one of these texts, and that we might make it suit with our usage.

XVI.

3640. *Another Example.* — We may give for another example of a legacy which depends on an uncertain time, that which a testator should bequeath in such terms as to make the legacy to depend on the death of his executor; as if he should charge him to give or deliver when he should die such a house or land, or other thing, to a legatee. For although this case be different from that of the preceding article, in that it is certain that the time will come when the said executor will die, whereas the majority of the legatee may perhaps never come to pass; yet in this case, as well as in the other, the time is uncertain, and it implies the condition, that, when the time shall come to pass, the legatee shall be in a condition to reap the profit of the legacy, and that he be then alive. So that if this legatee chance to die before the executor, he will have acquired no right to the legacy, and he will have transmitted nothing to his successors.[t]

[t] *L.* 4, *D. quand. dies leg. vel fid. ced*; — *l.* 13, *in f. eod.* See the thirteenth article of the eighth section of *Testaments*, and the remark which is there made on it.

XVII.

3641. *The Legatee who dies before the Election transmits his Right.* — We are not to reckon among conditional legacies, or those which depend on an uncertain time, a legacy left to the choice of the legatee, or of the executor. For although, if the legatee should happen to die before the election had been made, it would remain uncertain which were the thing bequeathed, and that the legacy could not have its effect, in order to be acquitted, till after this choice had been made; yet the right of the legatee was vested in him independently of this election, which was only to determine which was the thing bequeathed, and not to vest the right to it in the legatee. Thus, although the legatee should die before the election were made, yet he would transmit his right to his heir.[u]

XVIII.

3642. *Legacies annexed to Persons are not transmitted.* — Legacies which are annexed to the person of the legatee, such as a usufruct, an annuity, a legacy of alimony, and others of the like nature, which the testator intended only to bestow on the person of the legatee, are not transmitted to his heir. And if, for example, a testator had given leave to one of his friends to dig stones out of a quarry, or to use a passage, or other service, for some ground, this right being only for the use of the said person, his death would make it to cease, unless the expression of the testator should relate likewise to the heirs of the legatee.[x]

XIX.

3643. *An Annual Legacy contains several.* — The legacy of a sum of money to be paid every year to a legatee during his life, either by way of pension, or for alimony, or otherwise, is considered as containing so many legacies as there shall be years in the life of the said legatee; and the legacy of every year is due to him as soon as it is begun, pursuant to the rules explained in another place.[y] Thus, his right to every legacy is acquired according as he goes out of one year into the other. And when he dies, he transmits to his heir, not only the arrears of the years that were

[u] *L.* 19, *D. de opt. vel elect. leg.* See the fifteenth article of the seventh section.
[x] *L.* 8, § 3, *in f. D. de liber. leg.*; — *l.* 39, § 4, *D. de leg.* 1; — *l.* 6, *D. de servit. legat.*
[y] See the sixth and ninth articles of the fifth section.

fallen due, but also of the year which he had begun, and which his death has interrupted.[z]

XX.

3644. *Example of a Legacy annexed to the Person of the Legatee.* — If a father who had two sons, one of age, and the other under fourteen years, had named them both his executors, and given to the youngest some lands or houses, and a sum of money to be paid him after his majority, leaving till that time this sum, and the enjoyment of those lands or houses, to his eldest son, on condition that he should acquit the charges of the estate, and that he should give every year to their mother a certain pension for the maintenance of the youngest son, and the eldest son should chance to die before this time had expired, his death would make this enjoyment which he had of the said lands to cease; and it would not go to his children, or other heirs, whom he should leave behind him. For although, if he had lived, the enjoyment would have lasted to the time regulated by the testament, yet it was given him only as a personal bounty annexed to the good office which he was to render to his brother, and which the father had considered as a function of a tutor, although this second son had other tutors. Thus, the death of the eldest son putting an end to the motive of the father, which was limited to the person of the eldest son, would likewise put an end to an enjoyment which the father had left to him only with this view.[a]

XXI.

3645. *The Delay of the Right of the Executor does not suspend that of the Legatee.* — When the succession is open by the death of the testator, if it happens that there be not as yet any testamentary heir or executor; as if he who was named to be so were a posthumous child not yet born, or if the executor should defer accepting of the succession, or if he could not accept it, by reason that some condition kept his right in suspense; the legacy is nevertheless vested in the legatee, and he has his right secure.[b]

[z] *L.* 10, *D. quand. dies leg. ced.*; — *l.* 12, *eod.*; — *d. l.* § 1; — *l* 1, *C. eod.*; — *d. l.* 12, § 3.

[a] *L.* 21, § *ult. D. de ann. leg.* It must be observed on this text, that the tutorship ended at the age of fourteen years according to the Roman law, as has been mentioned in the preamble of the title of *Tutors*.

[b] *L.* 7, *d. l.* §§ 1 *et* 2, *D. quand. dies leg. ced.* See the nineteenth article of the fifth section of *Testaments*, and the remark that is there made on it.

XXII.

3646. *A Legacy whose Effect is suspended, and which is transmitted.* — If a testator had devised to one of his friends a land which he had in marriage with his wife, and to his wife instead of the said land a sum of money, and after the testator's death, his widow delaying to make her election whether she would take the legacy of the sum of money, or her land, the legatee should happen to die before she had made her option, he would transmit his right to his heir. And if the widow should afterwards resolve to take the legacy of the money, that of the land which he had with his wife in marriage would go to the heir of this legatee. For although this legacy did imply the condition that the widow should part with the land, yet seeing she might have determined herself as to the choice at the moment that the succession was open, and that this delay was not within the intention of the testator, as the waiting for the event of another sort of condition which he had imposed would be, but this delay arising only from the act of a third person, it is altogether foreign to the testator's intention, and ought not to hurt the legatee.[c]

Remark on the Preceding Article.

3647. It is said in the text cited, that it was rather a delay which the testator had annexed to this legacy, than a condition on which he had made it to depend. But this legacy did in effect imply this condition, that the widow should accept the legacy of the money, and part with the land. For if she had taken back the land, there would have been nothing for the legatee, unless the testator had devised to him alternatively either the land which he had in marriage with his wife, or the sum of money. But although the legacy be in this sense conditional, yet seeing the condition consists in the choice which the wife is to make, it would not be just that her delay should make the legacy to perish. And seeing it was both natural, and agreeable to the intention of the testator, that this election should be made immediately after the testator's death, this delay, which proceeds from the act of a third person, and not from the intention of the testator, ought not to prejudice the right of the legatee. And if the widow chooses the sum of money, this election is considered as if it had been made, as it ought to have been, at the moment of the testator's death.

[c] *L.* 6, § 1, *D. quand. dies leg. ced.*

XXIII.

3648. *The Legacy, with which the Person who is substituted Executor is charged, is acquired by the Death of the Testator.* — If a testator, having substituted a second heir or executor to succeed him in default of the first, by that form of substitution which is called vulgar, which shall be explained in the first title of the fifth book, had made a bequest, with which he had charged only the heir or executor who was substituted in the second place, and not him who was instituted in the first, and it so fell out that the legatee died before the inheritance passed to the person substituted to the first heir or executor, the legacy would be transmitted to the heir of this legatee. For the inheritance could not pass to the substituted heir but with this burden; and he, coming to succeed in the room of the first heir, is reputed to be heir from the moment of the testator's death, pursuant to the rule which hath been explained in its place:[d] so that he ought not to profit by the death of the legatee, which happened during this delay of his coming to the inheritance. And it would be the same thing in the case of that sort of substitution which is called pupillary, which shall be considered in the second title of the fifth book, if the person substituted to the pupil were charged with the legacy.[e] And although in these two cases of these two sorts of substitution the legacy implies the condition that the person who is substituted shall succeed, yet it is not for all that conditional. For with regard to the person substituted who is charged with the legacy, it is pure and simple, since it cannot fall out that he should be heir or executor without owing the legacy.

SECTION X.

OF THE DELIVERY AND WARRANTY OF THE THING BEQUEATHED.

ART. I.

3649. *The Legatee ought to have the Legacy delivered to him, and not to take it by Force.* — Since the legacy is to be taken out of the inheritance, the possession whereof passes from the testator to the executor, it is from his hands that the legatee ought to have

[d] See the fifteenth article of the first section of *Heirs and Executors* in general.
[e] *L.* 1, *D. quand. dies leg. ced.*; — *l.* 7, §§ 3 *et* 4, *D. eod.*

the thing that is bequeathed; and in what terms soever the bequest be conceived, even although the testator should ordain that the legatee should take the thing bequeathed, yet he cannot seize upon it, and take it out of the possession of the executor, without his consent. For it would be an act of violence, which is unlawful. But if the executor should refuse to deliver the thing to him, he ought to apply to justice for an order to have it delivered.[a]

II.

3650. *The Executor ought to take Care of the Thing bequeathed.* — While the thing bequeathed remains in the custody of the executor, he is bound to preserve it until he delivers it to the legatee; and if it perishes, or is damaged, through his fault or negligence, he will be accountable for it: for he is obliged to take exact care of it, and he ought to answer for the faults that are contrary to this care.[b]

III.

3651. *Legacies without any Term or Condition are due from the Acceptance of the Succession.* — The legacies for the delivery or payment of which there is no term set, and which are not conditional, ought to be paid immediately after the executor has accepted the succession.[c]

IV.

3652. *The Legacy ought to be delivered in the Place where it is at the Time of the Testator's Death.* — The thing bequeathed ought to be delivered to the legatee in the place where it is at the time of the testator's death; unless it should appear that it was his intention that it should be delivered in another place; in which case

[a] *L.* 1, § 2, *D. quod. leg.* If the legacy were of an immovable thing, it would seem to be less necessary to oblige the legatee to make a demand of it from the executor in case he did not of his own accord offer to deliver it; but it might happen that the executor should have a mind to contest the legacy, or that he might have a right to retain the possession of it for some time, as if it were a house of which he had the keys, and in which there were movables belonging to the inheritance; or if it were some lands of which the crop was to be his. And there might be other just causes why the legatee should not put himself in possession of the legacy. So that the rule appears to be just for all sorts of legacies without distinction; and it is so ordered by many customs. The legacy ought to be delivered either by the executor of the testament, or by the heir.

[b] *L.* 47, §§ 4 *et* 5, *D. de legat.* 1. See the eleventh article of the first section of *Substitutions* direct and fiduciary. See the eleventh article of this section.

[c] *L.* 32, *D. de leg.* 2.

the executor must cause it to be transported thither at his own charges.[d]

V.

3653. *If a Horse that is bequeathed were run away in the Lifetime of the Testator, the Executor is not obliged to make Search after him.* — If the legacy was of a horse, or of a herd of cattle, or of animals of other kinds, and before the death of testator the horse had run away, or some of the cattle strayed, the executor would not be bound to make search after the horse or herd, and to bring it back; and if the legatee would reap the benefit of the legacy, he would be obliged to be at this expense himself. But if this case had happened after the death of the testator, the executor would be obliged to be at this expense, pursuant to the rule explained in the second article.[e]

VI.

3654. *The Legatee is liable to Costs and Damages for not receiving his Legacy.* — If the thing bequeathed were of such a nature as that, the legatee delaying to receive it, the executors should by his delay suffer some loss or damage, the legatee would be bound to make it good. Thus, for example, if it were a legacy of cattle, the legatee would be liable for the charges of keeping them, of feeding them, and for the other costs and damages which the executor might chance to be at. Thus, for another example, if through the legatee's default of receiving wine, corn, or other things which should take up places or movables necessary for other uses, the executor should lose the occasion of letting out to hire the said places or could not himself make use of them and the other things for his own concerns, the legatee would be answerable for all these damages. But the executor could not pour the wine out of the vessels, or throw the corn out of the barns, under pretext of the delay.[f]

VII.

3655. *Security for Legacies and Fiduciary Bequests.* — If the legatees should be in fear of losing their legacies, and should be unwilling to leave the goods of the inheritance to the disposal and

[d] *L.* 47, *D. de leg.* 1; — *l.* 38, *D. de judic.*; — *l. un. C. ubi fideic. pet. op.*
[e] *L.* 8, *D. de legat.* 2; — *l.* 108, *D. de legat.* 1.
[f] *L.* 8, *D. de trit. vin. vel ol. leg.*

management of the executor, they might provide against such danger, either by obliging him to give caution, or some other security, or by getting an order for seizing the goods, and sealing up the places in which the movables and papers belonging to the inheritance should be, in order to have an inventory of them made, and to have them exposed to sale, if that should be necessary for their payment. And it would be the same thing for the security of fiduciary bequests.[g]

VIII.

3656. *Two Cases where the Father and Mother, being charged with a Fiduciary Bequest to their Children, ought to give Security.* — If a father or a mother instituting his or her children or grandchildren executors, had substituted to them their children or other descendants, the persons substituted could not demand security for the goods of the fiduciary bequest from their father or mother who should be charged therewith, unless they had married a second time, or that the testator, out of a mistrust of their conduct, had expressly ordered some security to be given.[h]

IX.

3657. *The Executor recovers what he has laid out on the Legacies and Fiduciary Bequests.* — If the executor who is charged with a legacy or a fiduciary bequest has been at any charges for the preservation of the thing bequeathed, he will recover them, unless they are such as ought to be taken out of the profits or revenues of the thing. Thus, for example, if an executor being charged with a fiduciary bequest of a house which he should restore after

[g] *L.* 1, *D. ut legat. seu fideic. serv. caus. cav.*; — *d. l.* 1, § 10; — *d. l.* § 2; — *l.* 1, *C. ut in poss. legat. vel fid. serv. c. m.* It is said in the second and seventh laws of this title in the Code, that the testator may discharge the testamentary heir from giving security for the payment of the legacies and the fiduciary bequests; and it is very just that a testator should have this liberty. But our usage and equity would apply some temperament in this matter, should the testamentary heir make a bad use of the testator's indulgence to him; and if there were any danger for the legatees, they might apply for remedy to a court of justice. For it would be presumed, even as to the testator's will, that he did not intend to countenance any knavish dealing on the part of his testamentary heir.

[h] *L.* 6, *d. l.* § 1, *C. ad senat. Trebell.* Although the security mentioned in this law seems to be meant of a caution or bail, according to the ordinary meaning of this word *satisdationem*, yet the most learned interpreters take it in another sense which this word may bear, and that is a bare submission, which would be but a slender security in case there were occasion for any: and it would seem as if the use of this rule ought very much to depend on that which equity may require, according to the quality of the goods, that of the persons, and the other circumstances that might come into consideration.

his death, and, the said house having perished, or being damaged without any fault of his, he had rebuilt it, or repaired it, this expense would be estimated in proportion to the quality and necessity of the repairs, and the condition in which the house was at the time of the testator's death, the time that it had lasted, and according to the other circumstances necessary to be considered in making the said estimate.[i]

X.

3658. *He ought to acquit the Charges of the Lands devised until the Time of Delivery.* — The executor is also bound to acquit the taxes, ground rents, and other charges of the things devised, whether they fell due in the time of the testator, if there remain any arrears due, or since the testator's death, during the time that the executor had the enjoyment of them. And if he is obliged to restore the fruits which he has reaped, these kinds of charges will be deducted out of them.[k]

XI.

3659. *The Executor bears the Loss, if the Thing perishes after his Delay to deliver it.* — If, the executor being in fault for not delivering the thing bequeathed, it happens to perish, or to be damaged, even although it were by an accident, he will be accountable for it. For if the thing bequeathed had been delivered, the legatee might have perhaps either prevented the loss of it, or might have sold it.[l]

XII.

3660. *All other Loss, whereof nothing can be imputed to the Executor, falls on the Legatee.* — If it was the legatee who, having it in his power to receive the thing bequeathed, had delayed to do it, the loss or diminution which might happen would fall upon him. And it would be the same thing if the thing bequeathed had perished before the time that it was to be delivered, and nothing could be imputed to the executor.[m]

[i] *L.* 58, *D. de leg.* 1. See the twelfth article of the first section of direct *Substitutions.*

[k] *L.* 39, § 5, *D. de leg.* 1.

[l] *L.* 39, § 1, *D. de leg.* 1; — *l.* 47, § *ult. eod.*; — *l.* 3, *C. de usur. et fruct. leg.*; — *l.* 108, § 11, *eod.* If it were lands or houses that were devised, and they perish by the overflowing of a river, as it is said in the second of these texts, it would require particular circumstances to make the testamentary heir answerable for this loss; for it is not so easy to sell lands or houses as a movable thing.

[m] *L.* 26, § 1, *D. de legat.* 1.

XIII.

3661. *When a Thing is bequeathed indefinitely, the Executor ought to warrant the Thing which he gives.* — If the legacy were in general of a thing indefinitely, such as a horse, a suit of hangings, without specifying any particular suit, or any particular horse, the executor would be bound to warrant the thing which he had given for acquitting this legacy, if it should happen that the legatee were evicted of it. And whether the thing had been found among the goods of the inheritance, or that the executor had taken it somewhere else, and that he knew or were ignorant whose it was, he would be bound to give another in its place; for the testator meant to make a useful bequest.[n]

XIV.

3662. *Warranty of the Legacy of a Thing particularly named.* — If the legacy were of a thing particularly named by the testator, as if he had devised such a ground, or such a movable, which he believed to be his own, but which in reality was not his, the executor would be bound only to deliver the thing specified in the testament, and would not be obliged to warrant it. For it would be presumed that the testator had devised it only because he took himself to be the owner of it, and that he would not have made such a devise if he had known that the thing was not his own.[o] Thus, in a like case, if a father, disposing of his goods among his children, had charged one of them with a fiduciary bequest for another of the children of some land or tenement which the testator believed to be his own, he who, in performance of this disposition, had delivered the said land or tenement to his brother, at the time required by the fiduciary bequest, would not be bound to warrant the said land or tenement, if his brother should chance to be evicted thereof. But if, instead of a fiduciary bequest, the father's disposition were a partition that he had made among his children, giving to one of them this land or tenement for his share, his coheirs would be bound to warrant the said land or tenement,[p] pursuant to the rules explained in their place.[q]

[n] *L.* 29, § 3, *D. de leg.* 3; — *l.* 58, *D. de evict.*; — *v. l.* 71, § 1, *D. de leg.* 1. See the following article.

[o] *L.* 45, § 11, *D. de legat.* 1; — § 4, *Inst. de legat.* See the fifth article of the third section.

[p] *L.* 77, § 8, *D. de legat.* 2.

[q] See the sixth article of the first section and the first article of the third section of *Partitions.*

XV.

3663. *If he who evicts the Thing from the Legatee is obliged to restore the Price, it will go to the Legatee.* — If the legatee of lands or houses be evicted of them, and he who evicts them is obliged to restore the price of them, this price which is restored will belong to the legatee, and not to the executor. For the intention of the testator in devising to him the said lands or houses implies his intention that the legatee should at least have the benefit of the price. Thus, for example, if the devise were of lands purchased by the testator with a reservation of power to the seller to redeem them, whether the said lands were part of the king's demesnes, or belonging to some particular person, the money that should be for redeeming the lands would belong to this legatee.[r]

XVI.

3664. *The Executor cannot be restored against the Payment of a Legacy, although it be Null.* — If an executor had voluntarily executed a disposition of the testator by acquitting a legacy or fiduciary bequest which should be found to be null, he could not afterwards dispute the validity thereof. For having accomplished a disposition which his reason and conscience had obliged him to approve and execute, he could not revoke what he had done out of motives which made this payment a duty incumbent on him.[s]

XVII.

3665. *Nor likewise of a Legacy which he had paid before the Condition on which it was left was accomplished.* — Since the executor may acquit a legacy which he cannot be compelled by law to pay, he may with much more reason deliver sooner than he is obliged either a legacy or a fiduciary bequest, whether it be universal of the whole inheritance, or particular of a sum of money, or of some other thing, for the delivery of which a term was set which would delay the execution thereof, or even to which a condition were annexed which would suspend the validity of it. And although after the delivery of the thing, the condition on which it was left not happening, the disposition should be found to be null, yet this event would not have the effect to make this payment not to subsist. For the executor might discharge the legatee of the condition, and acquit the legacy or fiduciary bequest as pure and

[r] *L.* 78, § 1, *D. de legat.* 2. *L.* 2, *C. de fideicomm.*

simple, since he might acquit a legacy that was null from the beginning, as has been shown in the sixteenth article.[t]

XVIII.

3666. *Exception to the Preceding Article, as to the Interest of a Third Person.* — The rule explained in the preceding article is to be understood of the cases where a payment made before it falls due would be of no prejudice to third persons. For if, for example, an executor were charged to restore after his death, either the whole inheritance, or a part of it, or a sum of money, to some person, and in case the person who is substituted should die before the executor, the testator had called another person to succeed to the same fiduciary devise, the executor who, having a mind to favor the person substituted in the first place, had delivered up to him the thing which was devised in trust, would not be discharged of it, if the person substituted in the first place should die before him; and the right of the person substituted in the second place would remain entire for him to exercise it, the case happening that he outlived the executor.[w]

SECTION XI.

HOW LEGACIES MAY BE NULL, REVOKED, DIMINISHED, OR TRANSFERRED TO OTHER PERSONS.

ART. I.

3667. *A Legacy may be either Null at first, or become so afterwards.* — A legacy may be null two ways, either by reason of a

[t] Post mortem suam rogatum restituere hæreditatem, defuncti judicio et antequam sati munus impleat, posse satisfacere, id est restituere hæreditatem, quarta parte vel retenta, vel omissa, si voluerit, explorati juris est. *L.* 12, *C. de fideic.*

Although no mention be made in this text of a legacy or fiduciary bequest that is left upon a condition, yet it cannot be doubted that the executor who should know of the condition, and who without waiting for the accomplishment of it should execute the disposition of the testator, could not revoke his approbation of the said disposition. And this approbation ought to subsist with much more reason than that of a disposition which is void from the beginning, of which notice hath been taken in the preceding article.

[w] *L.* 41, § 12, *D. de legat.* 3. If the case explained in this article should happen, the person substituted in the second place might, without waiting for the death of the executor, take care that the goods should not go to the person substituted in the first place unless with the burden of his right, if the case on which the same is founded should happen, and unless sufficient security were given that the goods should be preserved.

nullity which is in the legacy from its beginning, or by reason of some cause which happens afterwards and annuls it. Thus, a legacy is null from its beginning, if the testament which contains it be null;[a] if the testator was incapable to dispose of his goods at the time that he made his will;[b] if the thing bequeathed could not be given away, as if it was a thing belonging to the public.[c] Thus, a legacy which was not null at first is afterwards annulled, if the testator falls under an incapacity which lasts till his death;[d] if the legatee happens to be at the same time under a like incapacity;[e] if he dies before the testator;[f] and if the thing bequeathed should happen to perish.[g]

II.

3668. *A Legacy may be either revoked, or diminished, or transferred from one Legatee to another.* — A legacy may be revoked,[h] or diminished, by taking something from it;[i] or it may be transferred from one legatee to another,[k] according as the second dispositions alter the former, as shall be hereafter explained.

III.

3669. *A Legacy that is Null in its Beginning remains always so.* — If a legacy is null in its beginning, at the time that the testament is made, and in such a manner as that, if the testator should happen to die at the same time, the legacy would be useless, it will not be afterwards made valid at what time soever the testator chances to die, and what change soever may happen. For the vice which hath annulled this legacy from its beginning is not to be repaired; but this is to be understood in the sense of the rules which follow.[l]

[a] See the third section of *Testaments*.

[b] See the second section of *Testaments*.

[c] See the second article of the third section of *Legacies*.

[d] See the twenty-seventh and twenty-eighth articles of the second section of *Heirs and Executors* in general.

[e] See the third article of the second section of *Legacies*.

[f] See the seventh article of this section.

[g] See the nineteenth article of this section.

[h] See the eleventh article, and those that follow.

[i] See the twenty-second and twenty-third articles.

[k] See the twenty-fourth article.

[l] *L.* 29, *D. de reg jur.*; — *l.* 201, *eod.*; — *l.* 1, *D. de reg. Caton.* The rule explained in this article is the same with that which is called in the Roman law the *Catonian Rule*, of which we have taken notice in the remark on the thirty-first article of the second section

IV.

3670. *An Example of this Rule.* — If one under the age of fourteen, having made his testament, and being afterwards arrived at that age which rendered him capable of making a testament, dies without making another, this testament, which would have been null if the testator had died immediately after he made it, will remain such, although at the time of his death he was capable of making a testament. For the incapacity under which he was at the time of making his testament is not removed by the capacity which he acquires afterwards, and which changes nothing in the preceding time.[m]

V.

3671. *Another Example of this Rule.* — If the legacy was vicious and null in its origin, by reason of the nature of the thing bequeathed, as if it was a public place, this legacy, which would be null if the testator had died at the time he made his testament, would not be valid afterwards, even although it should happen that before his death the thing bequeathed had changed its nature and had come into commerce. For this change, not being followed by a new disposition of the testator, would leave the former disposition in its nullity.[n] And it would be the same thing if, a testator having bequeathed a thing which belonged to the legatee, it should happen afterwards that this legatee had alienated it before the testator died. For although the legacy would have been good if this change had preceded the devise, yet, seeing it was null at the time when the thing bequeathed was already the legatee's own, it remains so for ever after.[o]

of *Heirs and Executors* in general. See that remark, as also what has been said in that second section, and in the second section of *Testaments*, touching the several sorts of incapacity, in order to apply to this and the following articles such of those rules as may be applicable to this section.

[m] See the second article of the second section of *Testaments*.

[n] Si talis sit res cujus commercium non sit, vel adipisci non potest, nec æstimatio ejus debetur. § 4, *Inst. de legat.*

Tractari tamen poterit, si quando marmora, vel columnæ fuerint separatæ ab ædibus, an legatum convalescat. Et siquidem ab initio non constitit legatum, ex post facto non convalescet. Quemadmodum nec res mea legata mihi, si post testamentum factum fuerit alienata: quia vires ab initio legatum non habuit. Sed si sub conditione legetur, poterit legatum valere. Si existentis conditionis tempore mea non sit. *L.* 41, § 2, *D. de leg.* 1. See, in relation to the last words of this last text, the following article.

[o] See the third and eighth articles of the third section.

VI.

3672. *An Exception to this Rule as to Conditional Legacies.* — The rule explained in the preceding article does not take place in conditional legacies. Thus, for example, in the same case of the foregoing article, of a legacy of a thing that was not in commerce, if the testator had bequeathed it upon condition, in case it should change its nature, and be capable of being acquired by the legatee; this legacy, which without this condition would remain null if the testator had died after making such a disposition, would have its effect, if this change should afterwards happen before the death of the testator. Thus, for example, if a testator had left a legacy to a foreigner on condition that he should be naturalized, this legacy, which without this condition would have been null if the testator had died immediately after making his testament, would have its effect if the said foreigner should happen to be naturalized before the death of the testator. For in these cases, and others of the like nature, the conditions have this effect, that the validity or nullity of the legacy remains in suspense until the event either annuls it or makes it valid.[p]

VII.

3673. *The Legacy is Null if the Legatee was dead before the Testament was made, or if he dies before the Testator.* — The legacy becomes null if the legatee dies before the testator. For it was only at the moment of the testator's death that the legatee's right could accrue to him. So that he, not being alive at that time, cannot acquire it: for which reason he does not transmit to his heir a right which he himself never had. And the legacy would be null with much more reason, if the legatee had been dead before the testament was made, the testator knowing nothing of his death.[q]

VIII.

3674. *The Charge imposed on the Legacy which proves to be Null passes to him who reaps the Benefit thereof.* — If, in the case

[p] *L.* 4, *D. de reg. Caton.*; — *l.* 41, § 2, *in f. D. de legat.* 2; — *l.* 62, *D. de hæred. inst.*; — *l.* 18, *D. de leg.* 2; — *l.* 1, § 2, *D. de reg. Cat.* See the close of the second text cited on the fifth article. See the remark on the thirty-first article of the second section of *Heirs and Executors* in general, where notice is taken of the case of this sixty-second law, *D. de hæred. inst*

[q] *L.* 4, *D. de his quæ pro non scrip. hab.*; — *l. un.* § 2, *C. de cad. toll.* See the fifth article of the tenth section of *Testaments.*

where the legacy happens to be null because of the legatee's dying before the testator, the said legacy had been accompanied with some charge, as if the testator had obliged the legatee to give a sum of money, or something else, to some other person, the nullity of the legacy would not annul the charge which the testator had imposed on it in favor of this third person. For it was as it were another legacy, which ought to subsist. Thus, this charge will go to the person who reaps the benefit of the legacy, whether it be the executor, or another legatee who was substituted to him that could not reap the benefit of the legacy, or that was joined with him in the bequest, and who, by right of accretion or survivorship, ought to have the thing bequeathed.[r]

Remarks on the Preceding Article.

3675. It is to be observed on this article, that we have set down in it only the case where the legatee happens to die before the testator, and not the case where he was dead at the time of making the testament, although both these cases be comprehended in the preceding article. For there was this difference in the Roman law between these two cases, that in that case where the legatee was dead before the testament was made, not only was the legacy null, but also the charge annexed to the legacy;[a] whereas in the other case the charge subsisted.[b] This difference was founded upon this, that the legacy left to the legatee who was already dead was held as not being written, and as a disposition as null as if it had never been made; whereas the legacy to the legatee who was living when the testament was made, and who died before the testator, was only confiscated, and fell to the exchequer before the change which Justinian made by the law cited on this article. Which hath no manner of relation to our usage, since with us the exchequer never reaps the profit of legacies that are null. But it may be remarked touching those legacies which are held to be not written, that there were cases in which the charges imposed on the said legacies were to subsist.[c] And what was just in those cases according to the Roman law would seem in our usage, and according to the principles of equity, to be so in all cases: and if a testator had charged a legatee, who was already dead be-

[r] *L. un.* § 4, *C. de caduc. toll.*
[a] *L. un.* § 3, *C. de caduc. toll.*
[b] See the text cited on this eighth article.
[c] *D.* § 3;—*l.* 17, *D. de leg. Corn. de fals.*;—*l. ult. D. de his quæ pro non script. hab.*

fore the testament was made, to give a sum of money or other thing out of his legacy to another person, the executor or other person who reaps the benefit of the thing bequeathed ought to be bound to acquit the said charge; since it would be, as is said in the article, as it were, another legacy which the testator had a mind to give, the validity of which it would seem ought not to depend on that of the legacy which was to bear the said charge.

IX.

3676. *A Legacy that was Good at the Time of making the Testament may become Null by a Change.* — A legacy, which would have had its effect if the testator had died immediately after the making of his testament, may become null in process of time, if, before the legatee has acquired his right, there happens a change, which puts things into such a condition, that, if they had been the same at the time that the testament was made, the legacy had been void. Thus, for example, if a legatee who was capable of a legacy at the time of making the testament, be incapable thereof at the time of the testator's death; as if he was a professed monk, or condemned to a punishment which should carry along with it a civil death; or if the thing bequeathed, which at the time of making the testament was in commerce, be at the time of the testator's death destined to a public use; these legacies, which would have been useful if the testator had died before these events, are null after they have happened.[t]

X.

3677. *Remark on the Preceding Article.* — We have said in the preceding article, that a legacy which was useful in its origin may become null, if, after the making of the testament, it happen that things be in such a condition, that, if they had been the same at the time the testament was made, the legacy would have been null; and we have not said that in general and without distinction every legacy is annulled by an event of this nature. For it may happen that such a change may not have the effect to annul the legacy. Thus, for example, if a testator who at the time of making his testament was capable of doing it happened to be incapable thereof at the time of his death, because he was fallen

[t] *L.* 3, § 2, *D. de his quæ pro non script. hab.*; — *v. l.* 12, *D. de jur. fisc.* See the following article. See the sixteenth article of the second section of *Testaments*, and the remark that is there made on it.

into a state of madness; this kind of incapacity would not hinder the validity of the testament, nor that of the legacy. So that the rule of the preceding article ought not to be literally understood in the sense of the words of the text from which it is drawn. But this rule, and also that of the third article, are to be taken in the sense that hath been given them, and according to the temperaments which result from the examples and exceptions that have been explained, every one of which sufficiently explains the cause which distinguishes it from the cases to which these rules ought to be applied.[u]

XI.

3678. *Divers Ways of revoking Legacies. — Example.* — A testator may revoke legacies either by express dispositions, such as a second testament or a codicil, or without any express disposition, as if he disposes otherwise of the thing bequeathed. Thus, for example, if a father, who had devised to his daughter certain lands, happening afterwards to marry her, gives her the same lands for her marriage portion, the legacy will be tacitly revoked by such a disposition. And this daughter, having these lands for her dowry, cannot pretend a second effect of this legacy.[x]

XII.

3679. *The Legacy of a Debt is revoked if the Testator procures Payment of it.* — If a testator had bequeathed to his debtor the debt which he owed him, and afterwards he obliged the debtor to pay it, the legacy would be revoked.[y] For it was not a sum of money to be received that was bequeathed, but an acquittance. Thus the payment annuls the legacy.

XIII.

3680. *The Alienation of the Thing bequeathed revokes the Legacy.* — If a testator sells, or alienates any other way, the thing bequeathed, the legacy is revoked. For seeing he strips himself of it, much more doth he deprive the legatee of it who was to have it from him.[z]

[u] See the preceding articles, the fourth article of the second section of *Testaments*, and the sixteenth article of the same section, together with the remark that is there made upon it.

[x] *L.* 11, *C. de legat.*

[y] *L.* 7, § 4, *D. de liber. leg.*

[z] Si rem suam testator legaverit, eamque necessitate urgente alienaverit, fideicommis-

REMARKS ON THE PRECEDING ARTICLE.

3681. We have thought proper to leave out of this rule that which is added in the first of the texts cited, that, if the testator has sold for an urgent necessity the thing which he had bequeathed, the legacy is not revoked unless the testamentary heir prove that the testator had an intention to revoke it. And we have also thought proper to leave out what is said in the second of these texts, that the sale of the thing bequeathed is no hindrance why the legacy should not subsist, if, when the testator sold it, he had not an intention to revoke the legacy.[a] *Si non adimendi animo vendidit, nihilominus deberi.* And we have set down only the bare rule, that the alienation annuls the legacy, and such as we see it in other places without these exceptions. It is in this manner that the lawyer Paulus has quoted this rule in the fourth book of his Sentences, tit. 1. § 9, *Testator supervivens si eam rem quam reliquerat vendiderit, extinguitur fideicommissum.* And we see in a law, that the sale of the thing bequeathed annuls the legacy in such a manner that, if a testator, having sold a slave whom he had bequeathed, should afterwards purchase him, this slave would not be due to the legatee, although he belonged to the testator at the time of his death, unless the legatee could prove that the testator had a new intention to leave him to him.[a] Seeing, therefore, the rule is, that the alienation annuls the legacy, and that, to make the legacy subsist, it was necessary, by the Roman law, to have proofs of the testator's intention, in order to know whether he intended that the legacy should subsist or not, it was not proper to add to the rule these exceptions which do not suit with our usage. For we do receive no other proof of the will of the testator than his testament, together with the known circumstances which may explain his intention. And the inconveniences would be infinite, if such proofs were admitted, as well as proofs of covenants prohibited by the ordinances.[b]

3682. As to what concerns the case of a sale which the testator

sum peti posse; nisi probetur, adimere ei testatorem voluisse. Probationem autem mutatæ voluntatis ab hæredibus exigendam. *L.* 11, § 12, *D. de leg.* 3.

Si rem suam legaverit testator, posteaque eam alienaverit; Celsus putat, si non adimendi animo vendidit, nihilominus deberi. Idemque Divi Severus et Antoninus rescripserunt. § 12, *Inst. de leg.*

[a] *V. l.* 15, *D. de adim. vel transf. leg.*

[b] See the ordinances quoted on the twelfth article of the first section of *Covenants*, and at the end of the preamble of the second section of *Proofs*.

may have made out of necessity, it would be necessary likewise in that case to come to proofs of the testator's intention. For it is said in the first of these texts, that, notwithstanding the necessity, the heir or executor ought to be admitted to prove that it was the testator's intention to revoke the legacy, whence it would follow that the legatee would be received on his part to prove the contrary; because, in the matter of proofs of facts, each party is at liberty to make his proof.[c] Thus, this proof, which it would be necessary to make in order to know whether the testator, having alienated the thing bequeathed out of necessity, had had an intention to revoke the legacy, would likewise be contrary to our usage.

XIV.

3683. *A Donation has the same Effect.* — If he who had bequeathed a thing had afterwards given it away to some other person than to the legatee, this donation would annul the legacy with much more reason than a sale. For one may be obliged to sell out of necessity a thing which he had bequeathed, and that without changing the good will which he had for the legatee; but one cannot be presumed to give it away to another except freely, preferring the donee to the legatee.[a]

Remarks on the Preceding Article.

3684. It is said in another law, that although the donation be found to be null, yet the legacy nevertheless is revoked;* which is founded upon this, that the donation, although it be in itself null, yet marks the express intention of the testator to revoke the legacy. And if, for example, a testator, having made a deed of gift of a thing which he had before bequeathed to another person than the donee, had continued in the same mind as to that donation until his death, it would be certain that his intention was to revoke the legacy. And although the heir or executor of the said donor should afterwards procure the deed of gift to be annulled by reason of some flaw in it, yet he might pursuant to this law maintain against the legatee that his legacy was annulled. But if it was the donor himself that had procured the deed of gift to be vacated, and he afterwards had made no change in his testament,

[c] See the sixth article of the first section of *Proofs*.

[a] *L.* 18, *D. de adim. vel transf. legat.*

* *L.* 24, § 1, *D. de adim. vel transf. legat.*; — *v. l.* 3, § *ult. D. de instr. vel instrum. leg.*

and had died without making other dispositions, that donation which the testator himself had revoked, ought it to have the effect of revoking a legacy which he had suffered to remain in his testament? And would there not be just ground to presume that this testator intended that his legacy should have its effect, not only because of his revoking the deed of gift, but because that, having made no alteration in his testament, he had confirmed all the dispositions thereof, and had signified his will to die in the same intentions, and that they should all of them have the same effect that the death of testators gives to their testaments?

XV.

3685. *The Pawning of the Thing bequeathed does not revoke the Legacy.* — Although the testator pawns after the making of his testament the thing which he had bequeathed, yet that will be no revocation of the legacy. For the making of his testament doth not debar him of the use of his goods, and this use of them does not annul the dispositions of his testament, which will have their effect, or not have it, according to the condition in which things shall be at the time of his death. Thus, although it be true that the pawning of the thing may be followed by an alienation of it, yet nevertheless, if the thing that is pawned belong still to the testator at the time of his death, it passes to the legatee; and the executor will be obliged to redeem it, as has been said in another place.[b] For it is a general obligation upon him to acquit all the debts of the inheritance.

XVI.

3686. *Nor the Changes of the Thing which reform and renew it.* — If after the making of the testament some changes are made in the thing that was bequeathed, although they be such that, if the nature of the thing can bear it, all its parts be renewed, yet all these changes of the thing bequeathed make no change in the legacy. Thus, the legacy of a ship, or of a house, or other edifice, is not revoked, although it be wholly repaired piecemeal and by degrees. Thus, the legacy of a flock of sheep is not revoked, although there remain not one of the first that were bequeathed.[c]

[b] See the seventeenth article of the third section. *L.* 3, *C. de leg.*; — § 12, *Inst. de leg.*

[c] *L.* 24, § *ult. D. de leg.* 1; — *l.* 65, § *ult. D. de leg.* 1. See the following article. The changes of the parts that make up a whole do not hinder the thing from being considered as being always the same, although there remain not one of the first parts of which it

For these changes being made on the thing itself, none of them changes it entirely; so that it remains the same after the last change.

XVII.

3687. *The Legacy of a Flock of Sheep subsists although there remain not one Head of those that were in it at first.* — The legacy of a herd of cattle may be augmented or diminished by the changes that may happen to it, and it passes to the legatee such as it is at the time that it falls due to him, whether it be increased since the time of making the testament, or lessened. And although there should be left one mare only of a stud, or only one sheep of a flock, although it could not be said that this one sheep was a flock, or that one mare a stud, yet, seeing this remnant was a part of the stud or flock bequeathed, it was comprehended in the legacy, and would remain as part of it, in the same manner as the ground on which a house stood that is burnt down would belong to the legatee of that house.[d]

XVIII.

3688. *If the Thing bequeathed changes its Nature, the Legacy is revoked.* — If the changes of the thing bequeathed be such as, though the matter or substance thereof may remain, yet the thing itself becomes thereby of another nature, or falls under another condition, so as that it is not any longer comprehended under the expression of the thing that was bequeathed, the legacy is revoked by this change. Thus, for example, if a testator who had bequeathed woollen or silk stuffs had afterwards made clothes of them, he would have by that revoked the legacy.[e] Thus, for another example, if a testator, having bequeathed some precious stones, should afterwards apply them to some other use, such as for the ornament of the hilt of a sword, of the case of a watch, a case of instruments, or other trinket, the legacy would be revoked by this change.[f] Thus, for another example, if a testator, having

consisted. Thus, a house that is often repaired is always the same. Thus, a court of judicature, a nation, a regiment, and even the bodies of men and of animals, are always considered as being the same, although it may happen that after a long time there remain not one of the small parts that composed them. For these things are in one sense always the same, for the reason explained in the article. *V. l.* 76, *D. de judiciis.*

[d] *L.* 21, *D. de legat.* 1; — *l.* 22, *eod.*

[e] Lana legata, vestem quæ ex ea facta sit, deberi non placet. *L.* 88, *D. de legat.* 3.

[f] Item quæro: si probari possit, Seiam uniones et hyacintos quosdam in aliam speciem

bequeathed trees, either felled or to be felled, had afterwards built a ship, or done some other work with the said trees, the legacy would be useless.[g] And if, on the contrary, a testator, having bequeathed a ship, should take it to pieces, the legacy would also be revoked, so as that the legatee could not lay claim to any of those pieces;[h] for it was only a ship that was bequeathed. And it would be the same thing if the thing bequeathed should chance to perish, so as that what should remain of it were of another nature than that which was bequeathed. Thus, for example, if, a herd of cattle or flock of sheep being bequeathed, there should not remain any one of them at the time of the testator's death, but only the hides or the wool, the legatee would have no right at all to these remains.[i]

XIX.

3689. *If there remains nothing of the Thing bequeathed besides Accessories, the Legacy is annulled.* — If the thing happens to perish, and there remain some accessories of it, none of them will be due to the legatee; for he was not to have these accessories except with the thing itself, which he cannot have. Thus, for example, if a horse that had been bequeathed with his harness

ornamenti, quod postea pretiosius fecit additis aliis gemmis et margaritis convertisse: an hos uniones vel hyacintos petere possit, et hæres compellatur ornamento posteriori eximere, et præstare? Marcellus respondit, petere non posse. Nam quid fieri potest, ut legatum vel fidei commissum durare existimetur, cum id quod testamento dabatur, in sua specie non permanserit? nam quodammodo extinctum sit. *L.* 6, § 1, *D. de aur. arg.*

[g] Sed et materia legata, navis, armariumve ex ea factum non vindicatur. *D. l.* 88, § 1, *D. de leg.* 3.

[h] Nave autem legata dissoluta, neque materia, neque navis debetur. *D. l.* 88, § 12.

[i] Mortuo bove qui legatus est, neque corium, neque caro debetur. *L.* 49, *D. de legat.* 2. See the following article.

We must understand the rule explained in this article in the sense which is there given to it by the examples which are there brought, in order to apply it to the other cases of the like nature.

It may be observed on the first of the texts cited on this article, that it is said in another, that the clothes which have been made of wool that was bequeathed were due to the legatee, unless the testator changed his will. *Si lana legetur et vestimentum ex ea fiat, legatum consistere; si modo non mutaverit testator voluntatem. L.* 44, § 2, *D. de leg.* 2. But seeing that first text does not put that condition, that the testator in making those clothes had an intention to revoke the legacy, and that, as has been observed on the thirteenth article, it is not agreeable to our usage to have recourse to these sorts of proofs; it follows from thence, that, according to our usage and that first text, the legacy ought to remain revoked by the said change, if there be nothing in the expression of the testator which may make it to be presumed that the legacy does subsist.

should chance to die, the legatee would have none of the harness.[l]

XX.

3690. *Particular Expressions derogate from general ones. — Example.* — If a testator who had bequeathed his house furnished, or his house together with all the furniture, had added to this legacy a particular clause by which he had bequeathed to the same person his hangings, this addition would not diminish the legacy of all the furniture, and would not reduce it barely to the hangings. But if, having bequeathed the house furnished, or the house with all its furniture, he had added that he bequeathed likewise such a particular suit of hangings, such as those which contain such a history, or that are in such a hall; the mentioning of these particular hangings would exclude the others, and would show that he did not think that the legacy of the furniture of the house would take in the hangings, and that he meant to give only those hangings which he had particularly mentioned. For in this case, and others of the like nature, what is particularly specified derogates from the general expression which comprehended the whole.[m]

XXI.

3691. *Another Example of the Rule explained in the Preceding Article.* — It follows from this rule, which declares that the expression by which a particular thing is specified derogates from the general expression which besides that thing takes in others, that if a testator had bequeathed to one of his friends all the horses in his stable that were come of his own stud, and to another all his saddle-horses; and that among these there were some that had been taken out of his own stud; they would be excepted out of the legacy of the horses come of the stud, and comprehended in the legacy of the saddle-horses. For the quality of saddle-horses determines to this particular kind the general expression of horses come of the stud, which may agree to other kinds of horses.[n] But if a testator had bequeathed to one the horses, or other things, of a certain kind, and to another those of another kind, and it proved that some of them, being of both kinds, were comprehended under

[l] *Ll.* 1 *et* 2, *D. de pecul. leg.*

[m] *L.* 80, *D. de reg. jur.*; — *l.* 12, § 46, *D. de instr. vel instrum. leg.*; — *l.* 18, § 11, *eod.*; — *l.* 9, *D. de suppell. leg.*

[n] *L.* 99, § *ult. D. de legat.* 3; — *v. l.* 15, *D. de pec. leg.*

both the expressions, there being nothing to fix them to any one of them in particular; those which should be found to be only of one of the two kinds would belong to the legatee of that kind; and those which should appear to be comprehended under both kinds would belong in common to the two legatees. Thus, for example, if the testator had bequeathed to one of them his coach-horses, and to the other his saddle-horses, and that there were some horses which served both for the coach and saddle, all the other horses would be divided between the legatees according to the uses for which the horses served, and the horses common to both uses would be in common to both the legatees.[o]

XXII.

3692. *The Legacy is diminished by the Diminution of the Thing bequeathed.* — If he who had devised his jewels, pictures, or other things, or even certain lands, sells a part of them, the legacy subsists only for what remains. For as the legacy would be augmented if the testator had added to the thing devised, so is it diminished when he takes any thing from it.[p]

XXIII.

3693. *By separating a Part of the Land or Tenement devised, to join it to another.* — If, without alienating the land or tenement devised, or any part thereof, the testator separates a portion of it, in order to join it to another land or tenement; as if, in order to enlarge a meadow or an orchard, he takes off a piece of a ground which he had devised; such a separation would lessen the legacy. For what is taken away from it becomes part of another land or tenement, to which the legatee will have no right.[q]

XXIV.

3694. *The Legacy being transferred, it is taken away from the First Legatee.* — When a testator, by a second disposition, transfers to a second legatee the same thing which he had before given to another person, the legacy of the first legatee is so far annulled by this legacy to a second, that, although it should happen that the second legatee should die before the testator, yet the first legatee would have nothing of the legacy: for the first disposition, which

[o] *D. l.* 99, *in f.*
[p] *L.* 8, *D. de leg.* 1. See the fifth and sixth articles of the fourth section.
[q] *L.* 24, § 3, *D. de leg.* 1.

was in his favor, was revoked by the second.[r] But if the testator had imposed any charge or condition on the legacy which he transfers in this manner, it would pass with the legacy to the second legatee, unless it were annexed to the person of the first legatee, or that it was the intention of the testator not to charge the second legatee with that burden.[s]

XXV.

3695. *A Revocation of one of two Legacies, which doth not annul any one of the two.* — If a testator had left two legacies to two persons of the same name, and by a second disposition he had revoked the legacy to one of them without distinguishing which of the two, so that it could not be known which of the two legacies was revoked, both would subsist: for it would be more just and equitable that the revocation which is obscurely expressed should be without effect, rather than to give it the effect of annulling two legacies, one of which ought certainly to subsist, according to the intention of the testator. But if, on the contrary, the testator had made only one bequest to one of two persons bearing the same name, so that it could not be known by the circumstances to which of the two he intended to leave the legacy, the legacy would be without any effect either to the one or the other. For the executor would be answerable only for one legacy, and neither of the two persons could prove that he was the legatee.[t]

XXVI.

3696. *If the Legatee renders himself unworthy of the Legacy, it is revoked.* — A legacy which was good, and made in due form, might be annulled, although the testator should make no manner of disposition, either express or tacit, to revoke it, if it should happen that the legatee should render himself unworthy of it by any of the causes explained in their proper place.[u]

XXVII.

3697. *Legacies are diminished without the Act of the Testator, by the Falcidian Portion.* — Although the testamentary heir or

[r] *L.* 8, *D. de adim. vel transf. legat.* [s] *L.* 95, *D. de condit. et dem.*

[t] *L.* 3, § 7, *D. de adim. vel transf. legat.* See the twenty-sixth article of the second section of *Testaments*, and the remark which is there made on it, and which may be applied to the second case of the present article.

[u] See the said causes in the third section of *Heirs and Executors* in general.

executor should pretend that the goods were not sufficient to acquit the legacies, yet he is nevertheless charged with them, if he accepts of the quality of heir or executor, purely and simply. But if he only takes upon him this quality with the benefit of an inventory, he will be accountable for the legacies only to the value of the goods that shall remain after the debts are paid, and moreover he may deduct from them the defalcation which shall be spoken of under the following title.[x]

TITLE III.

OF THE FALCIDIAN PORTION.

3698. By the Falcidian portion, which took its name from the author or inventor thereof, is meant the fourth part of the inheritance which the Roman laws appropriated to the testamentary heirs or executors, reducing the legacies to three fourths of the whole estate; so that the testamentary heir or executor was to have at least one fourth part entire, and the legacies could no way diminish it. This law was equally just both for the interest of the testators, of the testamentary heirs or executors, and of the legatees. For seeing the testators might perhaps overvalue their estates, or believe that they had more effects than really they had, and under this persuasion exhaust their whole succession with legacies, and so oblige their testamentary heirs or executors to renounce their succession, rather than to acquit the legacies without some defalcation, the interest which the testamentary heirs or executors have therein is altogether evident; and it is likewise the interest of the legatees rather to suffer a defalcation of their legacies than to lose them entirely, if, upon the executor's relinquishing the succession, the disorder in the affairs of the succession were to be attended with this consequence.

3699. The use of the Falcidian portion relates only to the dispositions of such testators, whose estates are situated in the provinces which are governed by the written law. For with respect to estates situated in the customs, seeing the said customs do reg-

[x] See the following title, and that of *Heirs or Executors with the Benefit of an Inventory.*

ulate what share of the estate ought to remain to the heirs at law, and what is left to the disposition of the testator, the reduction of legacies is differently regulated by the respective bounds which each custom has set thereto.

SECTION I.

OF THE USE OF THE FALCIDIAN PORTION, AND WHEREIN IT CONSISTS.

ART. I.

3700. *The Legacies cannot exceed Three Fourth-Parts of the Goods.* — The Falcidian portion is the fourth part which the executor may retain of the goods of the succession, when the legacies exceed the three fourth-parts.[a]

II.

3701. *All the Debts are to be paid before the Legacies, and even preferably to the Falcidian Portion due to the Executor.* — The fourth part, which the executor ought to have, is taken out of all the goods in general, but the goods are understood to be only such as remain after the debts are paid. Thus, the executor retains in the first place the fund that is necessary for paying the debts, and in the next place his own fourth part for the Falcidian portion out of what remains clear.[b] And we must reckon in the number of debts, that which appears to be due to the executor, if he was a creditor of the deceased, of what nature soever the debt were, even although it were a legacy or a fiduciary bequest which had been left to the deceased in trust for him. So that if, for example, a father to whom a legacy had been left in trust for his children, with liberty to him to choose which of them he would give it to, had left it to them all, instituting them heirs or executors in equal portions, and had bequeathed so many legacies as to give occasion to deduct the Falcidian portion, every one of his children, in computing his own Falcidian portion, might deduct his share of the legacy left in trust to the father for his use, as a debt due to him. For although the father had the liberty of choosing any

[a] *L.* 1, *D. ad leg. Falc.*
[b] *L.* 66, *D. ad leg. Falc.*; — *l.* 39, § 1, *D. de verb. signif.*

one of them to give it to, yet his failing to make the choice rendered him debtor to them all for what he was obliged to restore.[c]

III.

3702. *And likewise the Funeral Expenses.* — It is necessary also to deduct out of the goods the funeral expenses, which are preferred not only before legacies, but even before the debts, although there should not be effects enough in the succession to satisfy all the creditors. And this expense ought to be moderated so as not to exceed what is necessary.[d]

IV.

3703. *The Executor has not the Falcidian Portion unless he make an Inventory.* — The executor cannot demand the Falcidian portion if he has not claimed the benefit of an inventory, and does not make it appear, by an inventory made in due form, that the goods are not sufficient to satisfy all the charges. But the executor who takes upon him that office purely and simply, without claiming the benefit of an inventory, cannot pretend to the Falcidian portion, although it were true that the goods were not sufficient to answer all the charges.[e]

V.

3704. *The Heir at Law has Right to the Falcidian Portion.* — Although the Falcidian portion seems only to belong to executors or testamentary heirs, yet seeing legacies may be left by a codicil without naming any executor, and that in this case the heir at law is bound to pay the legacies, he has also right to the Falcidian portion. For the succession is as much due to him as to any other who might be instituted heir or executor by a testament.[f]

VI.

3705. *All Dispositions made in View of Death are subject to the Falcidian Portion.* — All the kinds of dispositions that are made in view of death, such as legacies, fiduciary bequests, gifts in consideration of death, whether they be made by a testament or by other acts, are subject to the Falcidian portion;[g] unless they

[c] *L.* 6, *C. ad leg. Falc.*; — *l.* 54, *D. ad leg. Falc.*

[d] § 3, *Inst. de leg. Falc.*; — *l. penult. D. de relig.*; — *l.* 1, § *ult. D. ad leg. Falc.* See the eleventh section of *Heirs and Executors* in general.

[e] *Nov* 1, *c.* 2; — *d. c.* 2, § 2. See the tenth article.

[f] *L.* 18, *D. ad leg. Falc.*

[g] *L.* 77, § 1, *D. de legat.* 2.

be excepted from it, pursuant to the rules which shall be explained in the last two sections of this title.

VII.

3706. *The Falcidian Portion is taken out of the Goods which are found in the Succession at the Time of the Testator's Death.* — The fourth part, which the heir or executor ought to have for the Falcidian portion, is computed according to the value of the goods of the inheritance at the time of the testator's death. For as it is at that time that the succession is open, so the same consists in what effects are found to belong to it at that time;[h] and the fruits and revenues of the time subsequent to the testator's death cannot augment the fund for the legacies, nor be reckoned to the executor as a part of his fourth which he ought to have for the Falcidian portion, the revenues or income whereof ought to belong to him.[i]

VIII.

3707. *The Goods are valued according to what they are worth at that Time.* — Seeing the Falcidian portion falls due to the heir or executor at the moment of the testator's death, and that it is taken out of all the goods that are found at that time in the inheritance, the goods ought to be estimated on the foot of what they might be worth at that time, whether the valuation be made by mutual consent of the executor and the legatees, or by order of the judge.[l] And in making the estimate of the lands, regard ought to be had to what they may be worth the more because there were fruits on the ground ready to be cut down in harvest-time, soon after the testator's death.[m]

IX.

3708. *The Losses of the Goods fall upon the Executor, if he accepts purely and simply.* — When the executor accepts the succession purely and simply, all the losses and diminutions of the goods of the inheritance, and even those which may happen by mere casualty, will fall upon him, and the legatees will not thereby suffer any diminution of their legacies; unless they had

[h] *L.* 56, *D. ad. leg. Falc.* See the following article.

[i] *L.* 15, § 6, *in f. eod.*

[l] See the first of the texts cited on the preceding article, and that cited on the tenth article.

[m] *L.* 9, *D. ad leg. Falc.*

given occasion to those losses by some fault which might be laid to their charge.[n]

X.

3709. *Difference between the Heir or Executor with the Benefit of an Inventory, and him who hath not that Benefit.* — Although the heir or executor does not accept the inheritance simply, but with the benefit of an inventory, yet the losses and diminutions of the goods will affect him in that quality. For by the goods of the inheritance are understood those that are found in it at the time of the testator's death, which lays the succession open, as has been said in the seventh article. But there is this difference between the heir or executor with the benefit of an inventory, and him who has taken that character purely and simply, without the said benefit, that whereas this last has no way to defend himself against the losses which fall upon him inevitably, the beneficiary heir or executor is still at liberty to renounce the inheritance, he giving an account of what he has received; and if he does renounce, the changes that have happened since the death of the testator will affect only the creditors and legatees. But the disorder of affairs that would ensue upon his renunciation may induce the legatees to bear a part of the losses, and to compound with the heir or executor; and in this case the diminution of the legacies and the Falcidian portion are regulated among them by common consent, according as they can agree the matter.[o]

XI.

3710. *The Estimate made by the Testator does not regulate the Falcidian Portion.* — If the testator had made an estimation either of all his goods, or of a part them, either in his testament, or by some other disposition, neither the testamentary heir on his part, nor the legatees on their part, would be obliged to regulate their rights upon that foot, if the estimate made by the testator were either above or under the true value of the things at the time of the testator's death. For as it is justice that does assign to them their portions, so it is the truth of the value of the goods that ought to regulate them.[p]

[n] *L.* 30, *D. ad leg. Falc.* See the tenth article of the first section of *Heirs and Executors* in general.

[o] *L.* 73, *D. ad leg. Falc.* As to what is said in this text concerning the profits which augment the goods of the inheritance, see the fifteenth article.

[p] *L.* 15, § *ult. D. ad leg. Falc.*; — *l.* 62, § 1, *eod.*

XII.

3711. *The Valuation of the Goods ought to be made with the Knowledge of all the Legatees.* — If it be necessary to make an estimate of the goods, in order to regulate the Falcidian portion between the executor and the legatees, the valuation ought to be made with the knowledge of all the parties concerned, whether it be made by order of court, or by the mutual consent of parties; and even at the instance of any one single legatee who should demand it only for a small legacy. But if the estimation were made only with the knowledge of some of them, it would be of no force to bind the others who should refuse to agree to it. And the executor may likewise call the creditors, in order to satisfy them how much the goods are lessened by the debts owing to them, and also to settle with them the value of the goods, in case they are willing to take any of them in payment of what is due to them.[q]

XIII.

3712. *Precaution for the Falcidian Portion with Respect to Goods that are uncertain.* — If among the goods of the inheritance there were any of such a nature as that it were uncertain whether they ought to be reckoned in settling the Falcidian portion; as, for example, if there were a lawsuit depending touching the property of some lands, or for a certain debt; or if it should depend on the event of some condition, whether a certain land or tenement, or a certain right, should or should not be part of the inheritance; these sorts of goods would not be reckoned as present goods, in order to regulate the fund for the legacies, and the proportion of the Falcidian portion; for these pretensions might prove vain and fruitless. But the Falcidian portion would be settled on the foot of the present goods. And as to those pretensions, the executor and the legatees would adjust among themselves the security that might be found necessary for doing justice to each other, according as the expectation of the event and the circumstances might require. Thus, the executor, who would not be bound to comprehend these uncertain goods in the computation of those of the inheritance, would oblige himself, in case they should remain in the inheritance, to augment the legacies proportionably. And if some particular considerations had induced him to acquit all the legacies, or some of them, on the foot of the augmentation which

[q] *L.* 1, § 6, *D. si cui plusq. per leg. Falc. lic. leg. esse dic.*

these goods in dispute would make to the legacies, if in the event they should be found to be part of the inheritance, the legatees would oblige themselves to restore, in case these goods should appear not to belong to the inheritance, what they may have received on that account: and they might likewise settle among themselves, under some penalty, an estimation of the said rights, such as they are, at a certain price, balancing the hazard of the loss or profit which might accrue by the event either to the executor or to the legatees.[r]

XIV.

3713. *The Diminutions of the Charges, and the New Funds, diminish the Falcidian Portion.* — If there were charges of the inheritance which should happen to cease, such as debts said to be owing by the deceased which shall appear to be paid, legacies which are afterwards annulled, or by the means of other causes there were any fund of goods of the inheritance which should come to the executor, at what time soever the same should accrue to him, whether at the time of the testator's death, or a long time after; all these sorts of profits accruing to him by reason of his quality of executor, they would augment the fund for the legacies, and would diminish the share which he was to have had out of the legacies for his Falcidian portion.[s]

XV.

3714. *Goods discovered after settling the Falcidian Portion diminish it.* — If after liquidating the Falcidian portion, and paying off the legatees, the executor having retained in his hands what was to be deducted from the legacies, there happened to be discovered some goods of the inheritance which were unknown to the legatees; as if there had fallen to the testator in his lifetime an inheritance of an absent person, whose death he knew nothing of; this event, which would augment the goods, would likewise cause a proportionable revocation to be made of what had been taken off from the legacies; and the legatees might demand from the executor the share that ought to come to them of these goods which have been newly discovered: and this would undoubtedly

[r] *L.* 73, § 1, *D. ad leg. Falc.*; — *l.* 63, *eod.* See the fourth article of the second section. See the latter end of the tenth article of this section.

[s] *L* 11, *D. ad leg. Falc.* See the following article. *L.* 50, *D. ad leg. Falc.*; — *l.* 51, *eod.*; — *l.* 52, § 1, *eod.*

be still more reasonable, if they were goods which the executor had industriously concealed from the knowledge of the legatees.[t] But we ought not to reckon as an augmentation of the goods of the inheritance, that which may arise from the fruits and other profits of the goods of the deceased; as if a herd of cattle had increased in number: for these profits, and all the fruits and revenues, belong to the executor,[u] except those which may have proceeded from the things bequeathed, and which for the same reason would belong to the legatees, according to the rules explained in the eighth section.

XVI.

3715. *If the Thing bequeathed cannot be divided, the Falcidian Portion is regulated by Estimation.* — Although the Falcidian portion diminishes the legacies, and takes off something from every one of them, and if they consist in sums of money, grain, liquors, and other things, out of which it may be easy to take a part for the Falcidian portion, one may retain it out of the thing itself; yet if, on the contrary, it be of such a nature that it cannot be divided, as a horse, a diamond, a service, the building of some edifice, and others of the like kind, the Falcidian portion whereof cannot be taken out of the things themselves, the matter is adjusted by estimation, whether it be that the executor gives to the legatee the value of what his legacy may amount to, or that the legatee gives back to the executor the value of what he was to have out of the legacy for his Falcidian portion. And if several executors were charged with a legacy of a thing that could not be divided, such as that of some work or building, although the nature of the legacy would make every one of the executors answerable for the whole legacy, because of its indivisibility, yet every one of them might acquit himself by offering his share of the price of the work or building, deducting only what he ought to retain for his Falcidian portion.[x]

[t] This is a consequence of the preceding article: for the inheritance comprehends all the goods that may accrue to the executor in that quality, at what time soever they come to be known, and at what time soever he accepts the inheritance; because his acceptance of the inheritance hath this effect, that it makes him to be considered as if he had succeeded from the moment of the testator's death, and as having had from that instant his right to all the goods of the inheritance. See the fifteenth article of the first section, and the fifth article of the second section, of *Heirs and Executors* in general.

[u] See the text cited on the tenth article.

[x] *L.* 80, § 1, *D. ad leg. Falcid.* See the ninth section of *Heirs and Executors* in general.

SECTION II.

OF THE DISPOSITIONS THAT ARE SUBJECT TO THE FALCIDIAN PORTION.

ART. I.

3716. *The Falcidian Portion ceases in certain Cases.* — The Falcidian portion ceases in divers cases, whether it be on account of obstacles that are on the part of him who claims it, which shall be explained in the following section; or by reason of other causes which make it to cease, which shall be treated of in the fourth section. And there are some dispositions, of which it may be doubted whether the Falcidian portion be due out of them or not, which shall be the subject-matter of the rules that follow.[a]

II.

3717. *The Favor of the Legacy or of the Legatee does not hinder the Falcidian Portion.* — The favorableness of the legacies doth not exempt them from being subject to the Falcidian portion; whether it be that the favor respects the quality of the legatee, even although it were a legacy left to the prince,[b] or that it respects the use of the legacy itself, as if it were a legacy for alimony.[c]

REMARKS ON THE PRECEDING ARTICLE.

3718. We have not set down in this rule the exception that is made to it by the greatest part of the interpreters, in favor of legacies to pious uses, which they conceive to be exempted from the Falcidian portion by the disposition of the hundred and thirty-first novel of Justinian, chap. 12, for it does not seem to bear that sense. And the most learned of the interpreters have been of this mind; and their judgment in this matter may be founded on two considerations which result from the words of this novel. One is, that the words seem to relate only to the testamentary heir who is backward in acquitting the legacies left to pious uses: and the other is, that there is nothing in this law which lays it down as a general rule, that legacies to pious uses are not subject to the Falcidian portion, as would have been necessary in order to abol-

[a] See the places quoted in this article.
[b] *L.* 4, *C. ad leg. Falc.*
[c] *L.* 89, *D. ad leg. Falcid.*

ish the ancient law which subjected this sort of legacies to it;[a] which Justinian himself seems to have presupposed in a law,[b] where, speaking of the precaution used by some testators, who, in order to avoid the deduction of the Falcidian portion out of their legacies to captives, instituted them their heirs or executors, he explains himself in these terms: *Si quis ad declinandam legem Falcidiam, cum desiderat totam suam substantiam pro redemptione captivorum relinquere, eos ipsos captivos scripserit hæderes ..... si enim propter hoc a speciali hærede recessum est, ut non Falcidiæ ratio inducatur, &c.* If the Falcidian portion had not been due out of legacies to pious uses, it would have been nowise necessary to institute the captives heirs or executors in order to avoid it. To which we may add, that the same emperor, in his first novel, at the end of the second chapter, ordaining that the Falcidian portion shall take place if the testator hath not expressly forbidden it, adds for a reason, that it may so happen that there are in his testament legacies to pious uses, which would make this prohibition of the testator's favorable, *forsan etiam quædam juste et pie relinquenti.* Which would not be a reason for favoring the express prohibition of the Falcidian portion, if it had not taken place in legacies to pious uses; seeing in this case this prohibition would be superfluous. But if in the hundred and thirty-first novel he had intended to establish it as a rule, that pious legacies should not be subject to the Falcidian portion, he would have explained it in such a manner as to make it to be understood; whereas his expression marks, on the contrary, that he restrains his disposition to the case of a testamentary heir who refuses to acquit the legacies to pious uses, and who says that there are not effects sufficient to do it. *Si autem hæres quæ ad pias causas relicta sunt non impleverit, dicens relictam sibi substantiam non sufficere ad ista; præcipimus, omni Falcidia vacante quidquid invenitur in tali substantia proficere provisione sanctissimi locorum episcopi ad causas quibus relictum est.* These are the words of this novel, which seem to intimate

[a] Ad municipia quoque legata, vel etiam quæ Deo relinquuntur, lex Falcidia pertinet. *L.* 1, § 5, *D. ad leg. Falcid.*

One of the most learned interpreters, who is of the number of those who understand this novel of the testamentary heir who is backward in paying the legacies to pious uses, has been of opinion, that in this first law, § 5, *ad leg. Falcid.*, instead of these words, *vel etiam ea*, we ought to read, *non etiam ea.* It is on the third section of the third title of the fourth book of the Sentences of *Paulus* that he hath made this remark. But as to this novel, this author is of the sentiment which we have just now explained.

[b] *L.* 49, *C. de episc. et cler.*

that the motive of this law was not to make a rule of it for discharging pious legacies from the Falcidian portion, but only to repress the infidelity or delays of executors; which would seem to have no manner of relation to the cases where nothing can be imputed to the executor. It is true, that, if these words are not express enough to gather from them that Justinian had made a general rule to exempt legacies to pious uses from the Falcidian portion, so neither are they clear enough, nor express enough, to show that his intention was to take away the benefit of the Falcidian portion out of pious legacies only from the executor who is backward in acquitting them; seeing he speaks of an heir or executor who alleges only for an excuse of his delay, that there were not goods sufficient to satisfy them, which would be a lawful excuse enough if the heir or executor could retain the Falcidian portion out of legacies to pious uses; and yet Justinian will not allow this excuse to be received. So that one might think that in his judgment it was none; and that perhaps he intended, that, notwithstanding this excuse, the legacies to pious uses should be acquitted without any defalcation. It is without doubt the obscurity and uncertainty that exist in these words of this novel that have divided the interpreters; and it is likewise that which hath obliged us to make here this remark, in order to give a reason why we have set down no rule for the Falcidian portion in legacies to pious uses; because we had no right to determine a difficulty of this nature, and we ought not to give any thing for a rule but that which hath the character of a perfect certainty, or the authority of a precise law. But it were to be wished that some regulation were made touching this difficulty.

III.

3719. *How the Falcidian Portion is regulated when there are Conditional Legacies.* — If the effect of a legacy depends on a condition, which is not come to pass when the executor and the legatees settle the Falcidian portion, it being then uncertain whether the legacy will be due, or whether it will be void, this uncertainty obliges the executor, and the legatees whose legacies are pure and simple, to fall upon some expedient for doing mutual justice to one another, according to the event which the conditional legacy shall have. And since, if, the condition being accomplished, the legacy should appear to be due, the other legacies would be diminished in proportion, and it would not be just that before this

event these legacies should be either suspended or diminished; the proper expedient to be taken is, that the executor should without delay acquit the legacies that are pure and simple, and that the legatees who receive payment of their legacies should oblige themselves, and give security, if it is thought necessary, both to the executor, and to the legatee whose legacy is conditional, that, if the condition shall come to pass, they will restore what ought to be deducted out of their legacies towards the payment of this conditional legacy.[d]

IV.

3720. *A Legacy of a Service is subject to the Falcidian Portion.* — The legacy of a service, which the testator had appointed to be taken either out of a house, or some other tenement, belonging to the inheritance or to the executor, is subject to the Falcidian portion. For the service is an inconvenience, which lessens the value of the house or tenement that is subjected to it, and which may be estimated at a certain price. Thus, this legacy contributes as well

[d] Is cui fideicommissum solvitur, sicut is cui legatum est, satisdare debet quod amplius ceperit quam per legem Falcidiam ei licuerit, reddi: Veluti cum propter conditionem aliorum fideicommissorum vel legatorum legis Falcidiæ causa pendebit. *L.* 31, *D. ad leg. Falcid.*

Si propter ea quæ sub conditione legata sunt pendet legis Falcidiæ ratio, præsenti die data non tota vindicabuntur. *L.* 53, *eod.*

Sed et si legata quædam pure, quædam sub conditione relicta efficiant, ut, existente conditione, lex Falcidia locum habeat: pure legata cum cautione redduntur. Quo casu magis in usu est, solvi quidem pure legata, perinde ac si nulla alia sub conditione legata fuissent. Cavere autem legatarios debere ex eventu conditionis quod amplius accepissent redditum iri. *L.* 73, § 2, *eod.*

Cautionibus ergo melius res temperabitur. *L.* 45, § 1, *eod.*

Interdum omnimodo necessarium est solidum solvi legatario, interposita stipulatione, quanto amplius quam per legem Falcidiam ceperit reddi. Veluti si quæ a pupillo legata sint non excedant modum legis Falcidiæ: veremur autem ne impubere eo mortuo alia legata inveniantur, quæ contributione facta excedant dodrantem. Idem dicitur, et si principali testamento quædam sub conditione legata sunt, quæ an debeantur incertum est: et ideo si hæres sine judice solvere paratus sit, prospiciet sibi per hanc stipulationem. *L.* 1, § 12, *eod.* See the thirteenth article of the first section.

It may be remarked on the second of the texts cited on this article, that instead of these words, *non tota*, some authors have thought that we ought to read *tamen tota*; and their criticism or conjecture seems to be pretty well grounded. For it would not be just that, for a legacy which may perhaps never be due, the legatees should suffer a defalcation of their legacies. But if this is no error of the transcribers, and there were really in the original the words *non tota*, it would be necessary to understand this rule of the cases in which the condition could not admit of any long delay. For if it were but for a short time that the event was to be expected, the executor might retain the proportions of those legatees who would not wait for the event, obliging himself to pay them their whole legacies in case the conditional legacies should have no effect.

as other legacies, according as it may be estimated: and the legatee ought to restore to the executor the share of the said estimation that shall be necessary for making up the Falcidian portion.[e]

V.

3721. *The Legacy of the Payment beforehand of a Debt that is due at a certain Term, or on a certain Condition, is subject to the Falcidian Portion.* — If a testator who owed a sum of money, or other thing, the payment or delivery of which was to be made only some time after death, or which was due only upon a condition that was not yet come to pass, had ordered by his testament that the said delivery or payment should be made after his death to this creditor, without waiting for the term fixed for the payment or delivery, or the event of the condition; it would be a legacy subject to the Falcidian portion, according to the estimation of the advantage which would redound to the legatee from this legacy, whether it were on account of the paying beforehand a debt that was due only at a certain term, which would consist in the interest of the money from the time of the testator's death to the time of the term, or because of the assurance of the conditional debt which might happen not to be due by the event; and this would amount to the value of the debt, if the condition on which it was due should not come to pass.[f]

VI.

3722. *The Legacy of a Debt which the Debtor is not able to pay is not reckoned in the Computation of the Falcidian Portion.* — If the creditor of an insolvent debtor had bequeathed his debt to a third person, this legacy would not be comprehended in the number of those which are subject to the Falcidian portion. For as this desperate debt would not be reckoned as part of the goods, so likewise this legacy would be no diminution of them. But if the testator had bequeathed this debt to the debtor himself, seeing this debtor might afterwards become solvent, one would take the precautions explained in the third article touching conditional legacies.[g]

Remarks on the Preceding Article.

3723. We have thought proper to give to the text cited the sense that is explained in the article. For as it would be unjust to

[e] *L.* 7, *D. ad leg. Falcid.*

[f] *L.* 1, § 10, *D. ad leg. Falcid.*

[g] *L.* 22, § *pen. et ult. D. ad leg. Falcid.*

reckon this debt among the goods of the inheritance, so it would not be equitable that the other legatees, who would reap no profit by it, should suffer a defalcation of their legacies upon account of this legacy, which would be no diminution of the goods with which the executor would be chargeable for payment of their legacies; and the executor, reaping in this manner the advantage of the deduction from their legacies, should have more than his Falcidian portion of the effective goods with which he would be charged. And although it be true that this legacy would be useful to the debtor himself, and that, as is mentioned in the text, he would receive this effect of the testator's liberality, that he would be acquitted of the debt, and that thus it would be in reality a legacy; yet the Falcidian portion is not granted to the executor in consideration of the profit which the legatees make of their legacies, but only because of the diminution which the inheritance suffers by the legacies.

VII.

3724. *Three Sorts of Cases to be regulated for the Falcidian Portion.* — From all the rules which have been explained in the preceding section, and in the present, it follows that there are two ways of regulating the Falcidian portion, according to two sorts of cases in which it may have place. The first is simple, and common in all the cases where the goods and the legacies have their value fixed. And the second is for the cases where there are goods in expectation, which are uncertain, or where there are conditional legacies, and where these uncertainties oblige the parties concerned to take the precaution of having sureties, as has been said in the third article of this section, and in the thirteenth of the preceding section. But there is a third sort of legacies of a nature which requires a third manner of regulating the Falcidian portion; which are the legacies of alimony, or of a pension, or of a usufruct; and this third manner depends on the rule which follows.[h]

VIII.

3725. *The Falcidian Portion is due out of a Legacy of a Usufruct, and in what Manner it is regulated.* — Seeing the legacies of alimony, of yearly pensions, of annuities, of a usufruct, and others of the like nature, consist only in a revenue which is to cease by

[h] See the following article.

the death of the legatee, one cannot make a just and precise estimation of the value of these legacies, in the same manner as one may do of others. But seeing it is necessary to fix the value of every legacy, in order to regulate the foot of the Falcidian portion with regard to all the legacies, the value of legacies of a usufruct, or of a pension, or of alimony, may be regulated at the price which the legatee might get for his legacy, according to his age, if he had a mind to sell it. But this estimation, which may serve to regulate the Falcidian portion of all the legacies hath not this effect with respect to this legatee, that he ought to pay on this foot, and from the time of the testator's death, the Falcidian portion of the price of his legacy. For he might chance to die the first year, and in that case, instead of being a legatee, he might become a debtor to the inheritance. And likewise, on the other hand, the diminution which this legatee ought to bear of his legacy on account of the Falcidian portion ought not to be delayed and put off to the end of the years that the usufruct or pension may last: but this Falcidian portion ought to be regulated, and taken yearly out of the usufruct or pension, in proportion to the diminution that is settled for all the legacies. And if, for example, the Falcidian portion cuts off a sixth part of all the legacies, including the legacy of the usufruct or pension, according to the valuations that shall have been made of all these legacies, the said legatee will owe every year for the Falcidian portion a sixth part of what he enjoys, unless they should agree by mutual consent to settle it on another foot.[1]

Remarks on the Preceding Article.

3726. Seeing it was not possible to reconcile all the texts cited, and to reduce them to a fixed sense that might agree to them all, we have endeavoured to form the rule on what we have been able to gather from the texts, by the reflections which we have been obliged to make on their different dispositions.

3727. It is said in the first text, that, to regulate the Falcidian portion of a legacy of a usufruct, the ancients had been of opinion that it was necessary to make an estimation of the right of the said usufruct; but that this opinion of the ancients is not approved, because one may take the fourth part of a legacy of a usufruct, as well as of other legacies. And afterwards it is there

[1] *L.* 1, § 9, *D. ad leg. Falc.*; — *d. l.* § 16; — *l.* 47, *eod.*; — *l.* 55, *eod.*; — *l.* 68, *eod.*

said, that, when the Falcidian portion is to be regulated among all the legatees, we must of necessity have recourse to this opinion of the ancients, because that in this case it is necessary to make an estimate of all the legacies: and also in the fourth of these texts, which is the fifty-fifth law of the title of the *Falcidian Portion*, it is said, that, when the Falcidian portion is to be regulated among several legatees, it is necessary to estimate a legacy of a usufruct at the price which the legatee might get for it, if he had a mind to sell it.

3728. In the second text, which is the sixteenth section of the first law, it is said, that, if the question be about a legacy of a yearly pension, seeing this legacy contains several, that is, one for every year, and that they are all conditional, every one of them depending on the life of the legatee, it is necessary, for this reason, to provide for the Falcidian portion by a mutual security to be given by the executor and the legatee, that they will do justice to one another according as the Falcidian portion shall afterwards take place; to which may be applied what has been said in the third article in relation to conditional legacies.

3729. In the third text, which is the forty-seventh law, it is said, that for a legacy of a yearly pension the Falcidian portion takes place on the pension of each year, but that one cannot judge of it till some time after; that in the mean time whilst the Falcidian portion doth not take place, the whole pension must be paid, and when the year shall come in which the Falcidian portion shall begin to take place, it will be necessary to diminish the pension of all the preceding years.

3730. In the fifth and last text, which is the sixty-eighth law, it is said, that the Falcidian portion of a legacy of alimony, or of a usufruct, is regulated differently according to the age of the legatee. That if he be no more than twenty years old, one reckons as if he would live thirty years longer. If he be between twenty and twenty-five years of age, they reckon that he may yet live twenty-eight years more. Thus, this law runs over and regulates all the other ages, and directs that in computing the Falcidian portion one should sum up all the years that it is reasonable to presume a legatee may have to live, according to his age, and that the legatee pay the Falcidian portion of this sum total. Thus, for example, if the legatee of a usufruct, or of a yearly pension of a thousand livres for alimony, is not as yet twenty years old, how much soever he wants of it, we must reckon as if he had yet thirty years to

live, which will make thirty thousand livres; and it is of this sum that he will owe the Falcidian portion. *Quantitas alimentorum triginta annorum computetur, ejusque quantitatis Falcidia præstetur.* And after having enumerated the computations of these several ages, it is said afterwards, that it was then the usage to reckon thirty years of life, not only for those who were but twenty years old or under, but also for those who did not exceed thirty years of age; and that as for those who were upwards of thirty, the usage was to reckon the number of years which they wanted of sixty. Thus it was, for example, twenty-five years for a legatee who was thirty-five years old, and ten for a legatee who was fifty years old; so that they never reckoned more than thirty years.

3731. It is easy to judge, by the different dispositions of all these laws, what are the difficulties which result from them, and the inconveniences of these several ways of regulating the Falcidian portion which are there explained. But I cannot forbear remarking on this sixty-eighth law, which is generally looked upon to be the principal rule of this matter, that the years of the ages are settled there on two different bottoms, none of which would be taken now for a rule in estimating a usufruct or an annuity, after the computations that have been made upon observation of the number of persons which die at every age. For according to these computations there are but few children that attain to the age of thirty years; few persons that are past twenty years, who arrive at fifty. Thus, if a legatee of a usufruct were only four or five years old, one would not estimate his usufruct at the rate as if he were to live thirty years; and for this age, and all others, one would rather follow the method now used for valuing of annuities. But even although it were certain that a legatee of a usufruct would live thirty years, or even although an annuity had been given to one and his successors for the space of thirty years, this usufruct or this annuity would not be worth the sum to which these thirty years would amount, seeing a rent for perpetuity would not be worth so much. Thus, it would be very unjust to regulate the Falcidian portion upon the foot of such an estimation, which would make a legacy of a usufruct, or of an annuity of a thousand livres a year, to be estimated at a higher rate for the Falcidian portion than a legacy of a rent for perpetuity of the like sum, which would not be worth above twenty thousand livres. But at what time should this Falcidian portion be taken? Should it be at the time of the testator's death, or after the death of the

legatee? The one would be very soon, and the other very late; and every one of these ways would be attended with strange inconveniences. Should it be every year that a part of the total of this Falcidian portion should be taken? But upon what foot could every year's share be regulated? And if it were, for example, a legacy of a pension of one thousand livres which was computed to last thirty years, and a sixth part was to be taken off from it for the Falcidian portion, which would amount to five thousand livres, how could one divide this sum so as not to take more of it one year than another, since it could not be known how long the legatee had to live, and that, if he should live only five years, all his usufruct would be consumed by the Falcidian portion?

3732. We may add on the subject of this sixty-eighth law, that it is taken out of a book which Æmilius Macer, who is the author of this law, had composed in relation to the right to the twentieth penny which the exchequer claimed out of all successions and legacies; so that it seems that the computations which we see in this law for the respective ages have been made as it were a tariff for settling this right; and although mention be there made of the Falcidian portion, as if these computations had been made to regulate it, yet an able interpreter has conjectured, that in all probability it was Tribonian who made that application of it to the Falcidian portion: which would be to suppose that he had made no manner of reflection on the infinite difference that was to be made between the use of the computations explained in this law for the several ages with respect to this right of the twentieth penny, and the use of the same computations with respect to the Falcidian portion. For as to this right of the twentieth penny, as it was necessary to pay it out of every legacy once for all, so it was necessary to fix the value of a legacy of a usufruct, in order to know what share of it the exchequer was to have. And it was for this reason that the said law fixed by that regulation the manner of estimating the value of the twentieth penny, although at too high a rate, for the reasons which have been remarked on the computations of the several ages. But for regulating the Falcidian portion of a legacy of an annuity for life, or of a usufruct, it would not be just to have recourse to the manner of computation laid down in that law, and to take the number of years which it gives to the duration of the usufruct, or of the annuity, according to the age of the legatee, in order to make the legatee pay the Falcidian portion of that sum total. This computation, even although it

were made upon a much lower foot, would be still unjust between the executor and a legatee, who, not being able to ascertain to himself two years of life, ought not to be obliged to pay the Falcidian portion of the value of thirty years, nay, not even of ten. So that the manner of estimating a legacy of a usufruct by the age of the legatee seems to be of use only between the executor and all the legatees, for regulating the common rate for the Falcidian portion of all the legacies; because it is necessary to make an estimate of them all from the time of the testator's death, and there would be too great inconveniences in deferring the regulation of the Falcidian portion to another time; whereas, without doing wrong either to the legatee of the usufruct, or to the other legatees, or to the executor, they may all of them by this method agree among themselves about the value of a legacy of a usufruct, according to the age of the legatee, as it were by a kind of bargain by the great, which it would be a hazard whether the same should prove advantageous to the executor or to the legatees. But as to the particular Falcidian portion of a legacy of a usufruct, it seems an easy matter to regulate it upon the same foot with the other legacies. And if, for example, the Falcidian portion were fixed at a sixth part of all the legacies, including that of the usufruct, there does not seem to be any injustice or inconvenience, if the executor should retain a sixth part every year of the usufruct; since this defalcation would do the same justice to this legatee, and to the executor, as a like defalcation out of a rent for perpetuity, with this only difference, which would be very just, that as to the rent for perpetuity, the capital stock would likewise be diminished in as much; whereas in the usufruct, or annuity for life, which has no capital as a perpetual fund, the diminution would be limited to the years of the life of the legatee.

SECTION III.

OF THOSE TO WHOM THE FALCIDIAN PORTION MAY BE DUE OR NOT.

ART. I.

3733. *The Executor who takes that Character upon him purely and simply hath no Right to the Falcidian Portion.* — Seeing the executor who takes that quality upon him purely and simply accepts the inheritance without the benefit of an inventory, he can-

not pretend to the Falcidian portion: for this quality engages him to all the charges without distinction, and that even beyond the effects of the inheritance.[a] And it is only the beneficiary heir or executor who, having made an inventory of the goods, is no further accountable for the legacies, and other charges, than as there are goods in the succession sufficient to acquit them, he deducting out of the legacies the fourth part of the goods for the Falcidian portion.

II.

3734. *The Beneficiary Heir or Executor who defrauds, loses the Falcidian Portion of the Goods which he attempted to conceal.* — Although the heir or executor have made an inventory, yet if it be found that he has defrauded the legatees, by withdrawing or concealing some effects of the inheritance, he will be deprived of the Falcidian portion of those effects which he had attempted fraudulently to withdraw or conceal.[b] But we must not reckon in the number of heirs or executors who have withdrawn or concealed the effects, him who should pretend that a thing which he claims as his own ought not to be comprehended among the goods of the inheritance, although it should afterwards appear that the same thing was a part of the inheritance: for it was a pretension which he might have had without any knavish design, and which, although it should appear to be unjust, yet, being intimated to the legatees, would not have the character of a fraudulent diverting the effects of the succession.[c]

III.

3735. *And also of the Legacy which he attempted to suppress.* — If the executor has been guilty of any fraud in endeavouring to make the legacies or fiduciary bequests to perish, as if he had suppressed a codicil which contained them, or by any other way, he will be obliged to acquit those legacies or fiduciary bequests whole and entire, without deduction of the Falcidian portion.[d]

[a] See the fourth article of the first section of this title, and the second article of the first section of *Heirs and Executors* in general.

[b] *L.* 6, *D. de his quæ ut ind.*; — *v. l.* 24, *D. ad leg. Falcid.*; — *l.* 48, *D. ad senat. Trebell.* See the following article.

[c] *L.* 68, § 1, *D. ad leg. Falc.*

[d] *L.* 59, *D. ad leg. Falc.*

IV.

3736. *The Heir at Law, or Next of Kin, doth not lose the Falcidian Portion, for offering to renounce the Right he has by Testament.* — If the heir at law or next of kin, being instituted executor by a testament, should pretend to renounce his testamentary institution, that he might succeed to the deceased as dying intestate, and so free himself from the burden of the legacies, seeing he would not be deprived of the inheritance, as has been said in another place, and that he would remain under the obligation of acquitting the legacies, he would not be deprived of the Falcidian portion.[e]

V.

3737. *When several Executors are charged with different Legacies, every one retains his own Falcidian Portion out of the Legacy he is charged with.* — If there be several heirs or executors instituted in divers portions of the inheritance, and the portions of some of them be charged with legacies from which the others are exempted, every one will retain his own Falcidian portion out of the legacies with which he is charged, and must not supply the same out of the portions of the inheritance which belong to the other heirs or executors.[f] Every one likewise will deduct out of his own portion of the inheritance the debts and other charges which the testator shall have imposed upon it.[g]

VI.

3738. *Legatees who are charged with Legacies have not the Falcidian Portion.* — If a legatee had his legacy burdened with some disposition in favor of a third person, such as a sum of money, or other charge which should diminish his legacy, or quite exhaust it, he would not for all that have a right to the Falcidian portion; but he would be bound either to acquit the whole charge, or to renounce the legacy. For the Falcidian portion is granted only to heirs or executors, and the legatees cannot claim this benefit in their own right.[h]

[e] *L.* 18, § 1, *D. si quis om. caus. test.* See the seventeenth article of the fifth section of *Testaments.*

[f] *L.* 77, *D. ad leg. Falc.* See the seventh and following articles of the fourth section.

[g] *L.* 8, *D. ad leg. Falc.*

[h] *L.* 47, § 1, *D. ad leg. Falcid.* See the following article. The reasons for establishing the Falcidian portion, which have been explained in the preamble of this title, agree only to heirs or executors.

VII.

3739. *Unless it be that their Legacies suffer this Diminution on Account of the Executor.* — If in the case of the preceding article, the executor being overcharged with all the legacies, the Falcidian portion were to take place in them, the abatement which a legatee who is burdened with other legacies would sustain thereby of his own legacy, the same being taken out of his entire legacy, would diminish proportionably this particular legacy with which he was charged by the testator: for it would be on account of the executor that the said diminution had happened.[i]

SECTION IV.

OF THE CAUSES WHICH MAKE THE FALCIDIAN PORTION TO CEASE, OR WHICH DIMINISH IT.

ART. I.

3740. *The Testator may forbid taking the Falcidian Portion.* — Although the Falcidian portion be a right which by law accrues to the executor who is willing to make use of it, and that a testator cannot hinder his dispositions from being subject to the laws;[a] yet it is nevertheless permitted to a testator to oblige his executor to acquit the legacies without deducting the Falcidian portion. And if he orders it so in express terms, the Falcidian portion will not take place. For this is an exception made by the law itself, and the executor is at liberty either to accept the inheritance on this condition, or to renounce it.[b]

[i] *L.* 32, § 4, *D. ad leg. Falc.* See the fifth article of the following section.

[a] See the twenty-eighth article of the second section of the *Rules of Law.*

[b] Si debitor, creditore hærede instituto, petisset, ne in ratione legis Falcidiæ ponenda creditum suum legatariis reputaret: sine dubio ratione doli mali exceptionis apud arbitrum Falcidiæ defuncti voluntas servatur. *L.* 12, *D. ad leg. Falc.*

Si in testamento ita scriptum sit: Hæres meus Lucio Titio decem dare damnas esto: et quanto quidem minus per legem Falcidiam capere poterit, tanto amplius ei dare damnas esto: sententiæ testatoris standum est. *L.* 64, *eod.*

It would seem by these texts and some others, that by the ancient law the testator might forbid the Falcidian portion, and the contrary seems to be established by other laws (*L.* 27, *D. ad leg. Falc.*); which has divided the interpreters. But this difficulty hath been removed by the first novel of Justinian, who has permitted the prohibition of the Falcidian portion in the manner it is explained in the article. *Nov.* 1, *c.* 2, *in fine.*

II.

3741. *The Legacy of an Immovable, with a Prohibition to alienate it, is not subject to the Falcidian Portion.* — If a testator had devised some immovable thing, whether it were to some one of his own family or to some other person, and had directed that the said immovable should not be alienated, it being his intention that the same should always remain with the legatee and his successors; the executor of this testator could not pretend to have the Falcidian portion of an immovable devised after this manner: for the prohibition to alienate it implies the will of the testator that the same should remain without any diminution to the legatee and to his successors.[c]

III.

3742. *The Testator who is Debtor to his Executor may forbid him to reckon his own Debt for the Falcidian Portion.* — If, the person who is instituted executor being a creditor to the testator, it were ordained by the testament that the said executor should not reckon his own debt for diminishing the goods of the inheritance, this disposition would hinder the diminution of the legacies which the said debt might have occasioned for the Falcidian portion.[d]

IV.

3743. *The Falcidian Portion doth not take Place in Military Testaments.* — The dispositions of military testaments are not subject to the Falcidian portion.[e]

Remarks on the Preceding Article.

3744. Is it a great favor to him who, by a military testament, names an heir or executor, and gives several legacies, to take away the right of the Falcidian portion from his heir or executor, who might by this means come to have nothing at all, if the inheritance should be exhausted with legacies? And will not this privilege in this case turn against the intention of the testator, who, if he had foreseen this event, would have without doubt moderated the legacies in favor of his testamentary heir, whom he had a greater value for than for the legatees? Or shall this rule be reduced to

[c] *Nov.* 119, *c. ult.*

[d] See the first of the texts quoted on the first article.

[e] In testamento militis jus legis Falcidiæ cessat. *L.* 7, *C. ad leg. Falcidiam;* — *l.* 12, *C. de test. mil.;* — *l.* 92 *et l.* 17, *l. ult. D. eod.*

the case where the disposition of the soldier or officer of war would amount only to a codicil, which would respect only the heir at law or next of kin, in favor of whom he had made no manner of disposition? We have, however, set down this rule without any distinction, the laws relating to it being precise. But it seems that, if the case should happen that there were nothing at all left, or but a small matter, for the heir, whether he succeed as heir at law or by testament, it would be equitable to mitigate the rigor of the law, seeing it was not the intention of the testator to strip him of all the goods.

V.

3745. *The Devisee of a Land or Tenement charged with a Pension to be taken out of the Fruits of the said Land or Tenement doth not retain the Falcidian Portion, although he himself bears it.* — If a legatee were charged with a yearly pension for alimony to some person, and his legacy were diminished by the Falcidian portion, but only so far as that there would remain still enough for the said alimony, this legatee would nevertheless bear the said charge entire, without any deduction. For it would be presumed of such a disposition, that it was the testator's pleasure that a legacy of this nature should not suffer any abatement, and that the legatee should content himself with what might remain clear after the said charge were acquitted, unless it should appear that this was not the intention of the testator; as if, for example, the legacy charged with the said alimony were of the same nature, and as favorable, as the other.[f]

Remarks on the Preceding Article.

3746. It is to be observed on this article, that it is an exception to the rule explained in the seventh article of the preceding section: so that it is an exception from another exception. For the rule explained in that seventh article declares that the legatees may retain the Falcidian portion when they themselves bear it, which makes an exception to the general rule explained in the sixth article of the same preceding section, which says that the legatees cannot retain the Falcidian portion out of their legacies, because it was established only for the benefit of heirs or executors. Thus, the rule explained in this present article is founded

[f] *L.* 21, § 1, *D. de ann. leg.*; — *l.* 25, § 1, *eod.*; — *l.* 77, § 1, *D. de leg.* 2.

on two principles which it joins together; one whereof is general, that legatees have no right to the Falcidian portion; and the other particular, in favor of a legacy of alimony specially assigned on the fund of a legacy, which the testator had given to the legatee only upon this condition. For although legacies of alimony be subject to the Falcidian portion when it is the executor that is charged with them, as has been said in the second article of the second section; yet the laws distinguish the condition of the legatee from that of the executor, and favor the executor more than the legatee, as has been said in the sixth article of the seventh section of testaments. Thus, they retrench the legacies of alimony when they diminish the portion of the inheritance which ought to remain with the heir or executor, and they do not retrench a legacy of that kind when it is only a legatee that is charged with it, although his legacy be thereby diminished or reduced to nothing.

VI.

3747. *What augments the Inheritance diminishes the Falcidian Portion.* — The diminution of legacies on account of the Falcidian portion may cease altogether, or be lessened, if it happens that the executor reaps the benefit of some disposition of the testator's, which accrues to him as heir or executor; for he may reap advantage by other dispositions which would not have the same effect: and this depends on the rules which follow.[g]

VII.

3748. *Whatever comes to the Executor in that Quality diminishes the Falcidian Portion.* — If a testator, having instituted two heirs or executors, substitutes them mutually to one another in that manner which shall be treated of in its place,[h] ordaining that, if one of them either will not or cannot take part in the succession, the other may have it entire; and one of the said executors having his share of the inheritance charged with legacies subject to diminution on account of the Falcidian portion, the case of the substitution should come to pass, so as that the said heir or executor should reap the benefit of the other's portion coming to him by virtue of the said substitution; this profit would diminish the Falcidian portion which he might have retained out of the legacies with which his share of the inheritance was burdened. For this

[g] See the following article.

[h] See the first title of the fifth book.

other portion of the inheritance would be goods that came to him in the quality of heir or executor: and one might consider him as being a pure and simple heir or executor for his own portion, and a conditional heir or executor for that portion which the case of the substitution was to procure him.[1]

VIII.

3749. *The Fund of the Legatees whose Legacies are assigned them on a Portion of the Inheritance that accrues to the other Heir or Executor, is not augmented by the Portion of the other Heir or Executor.* — If in the case of the preceding article one of the coheirs or coexecutors substituted to one another does not succeed, as if he died before the testator, or was incapable of succeeding, or renounced the inheritance, and his portion of the inheritance being overcharged with legacies, that of the other heir or executor who should remain alone were not burdened at all with any legacies; this heir or executor who remains alone would contribute nothing out of his portion of the inheritance to the legatees who have their assignments on the portion of the other heir or executor. For with regard to them, it would be the same thing as if the heir or executor whose portion is charged with their legacies had succeeded; in which case these legatees would be nothing the better for what the other heir or executor should have clear of his own portion; and this event would not make their condition the better. For the testator had limited their right to that portion of the inheritance which was to go to the heir or executor who was charged with their legacies, without burdening the other heir or executor with their legacies.[1]

IX.

3750. *The same in the Case of a Pupillary Substitution.* — If in the case of a pupillary substitution, which shall be treated of under the second title of the fifth book, a testator had instituted his son under fourteen years of age for one portion, and another heir or executor for the rest of the inheritance, substituting him to his son who was under the age of fourteen by that substitution which is called pupillary, and the testator had charged both the heirs or executors with legacies, in such a manner as that the Falcidian

[1] *L.* 1, § 13, *D. ad leg. Falc.*; — *l.* 78, *eod.* See the latter part of this text in the following article.

[1] See the second of the texts cited on the preceding article.

portion ought to take place either only in the legacies assigned upon one portion of the inheritance, or in the legacies both of the one and the other; the son in this case happening to die before his father, and the person substituted having in that case in his own right the two portions confounded together in one only inheritance, in the same manner as if he had been instituted sole universal heir or executor, all the legatees would have the advantage thereof, for the reason explained in the seventh article.[m] But if, the son having succeeded to his father, and dying before he arrived at the age of fourteen years, the person substituted to him did after his death enter to the succession, the legatees who had their assignments on the son, and whose legacies might be subject to the Falcidian portion, would not reap any profit from the portion of the inheritance which the substituted person had in his own right. For, as has been said in the eighth article, their legacies were assigned only on the portion of the inheritance which the testator had appropriated for the payment of them, and not on the portion which was left originally to the substituted heir or executor in his own right.[m] But if, in the case of the same testament, the portion of the heir or executor who was substituted to the son under fourteen years of age being overburdened with legacies, so as that the Falcidian portion ought to take place in it, the said heir or executor happened to succeed the son who died under the age of fourteen, his Falcidian portion would be diminished; and the legatees who had their assignments on him would reap the benefit of that which should come to him by virtue of the substitution: for it would be in the quality of heir or executor that he would succeed to it.[n]

X.

3751. *A Rule that results from the Four Preceding Articles.* — It follows from the rules explained in the four preceding articles, that, if legacies assigned on the share of the inheritance left to one of two testamentary heirs be subject to the Falcidian portion, it is not diminished by the change which makes that share of the inheritance to pass to the other heir: for he acquires it such as it is, and with its charges, and it doth not augment the charges of his own share. But if the testamentary heir whose share is charged with legacies acquires another share of the inheritance by the

[m] *L.* 87, § 4, *D. ad leg. Falc.* [n] *D. l.* § 5.

effect of a right of accretion, or of a substitution, the legatees who have their assignments on his share of the inheritance will reap the benefit of what shall come to him of the share of the other heir. For whereas, in the first case, the legatees whose legacies are subject to the Falcidian defalcation cannot say to the heir who acquires the share which is charged with their legacies, that he profits to their prejudice, seeing their condition remains the same as if there had been no change, and such as it was regulated by the testator; in the second case, the heir who reaps the benefit of the share of the other cannot say to the legatees who had their assignments on his portion of the inheritance, that their legacies were limited to his portion: for seeing they have their assignment on him, they reap the benefit of whatsoever part of the inheritance comes to him, as has been said in the seventh article.[o]

XI.

3752. *What is bequeathed to one of the Executors, to be taken out of the Share of the Inheritance that is left to the other, does not diminish the Falcidian Portion.* — If one of the coheirs or coexecutors has his share of the inheritance charged with a legacy to the other, and the said executor, who is also a legatee, be on his part charged with legacies to be paid out of his share of the inheritance, so that the Falcidian portion ought to take place in them, the legacy which he receives out of the share of the other executor will not diminish the Falcidian portion that is due from those legacies which he is charged with. For it is not as executor that he receives this legacy; and we do not reckon among the goods which are liable to satisfy the legacies, any other besides those that come to the executor in that quality, and by virtue of his right to the inheritance, and not those which may accrue to him by any other title. Thus, this legacy coming to him in the same manner that it would to another legatee, he does not reckon it as part of the Falcidian portion that is due to him.[p]

XII.

3753. *Falcidian Portion between Coexecutors who are Legatees.* — If, in the case of the preceding article, an executor being charged with a legacy to his coexecutor, the Falcidian portion ought to

[o] This is a consequence of the preceding articles.

[p] *L. 74, D. ad leg. Falc.; — l. 91, eod.; — l. 22, eod.* See the following article.

take place; this legacy would be subject to it as well as all the other legacies; for it would diminish in the same manner the fourth part of the goods. But if both one and the other executor were charged with reciprocal legacies, and they were in the case that the Falcidian portion ought to take place, whether on the part of one of them only, or on the part of both; that which one of the said executors would have to receive of the legacy which the other was to pay him would be compensated with the Falcidian portion due out of the legacy which he owed him reciprocally. And seeing this compensation would make up a part of the Falcidian portion of the total of the legacies, he would retain out of the legacies due to the other legatees only what should be wanting to make up the Falcidian portion of all the legacies in general, deduction being made of so much of it as would be satisfied by the said compensation.[q]

XIII.

3754. *An Executor instituted for several Shares of the Inheritance ought to confound them together, in order to make up the Falcidian Portion of the Legacies that are assigned on all the Shares.* — It follows also from the same rules, that if an executor were instituted for two different shares of the inheritance, as for a fourth part by way of preference over and above his equal share with his coexecutor, and for a moiety of the other three fourths, and that each of these shares, or only one of them, should chance to be so overcharged with legacies, that there would be room for the Falcidian portion to take place therein; it would be necessary to confound the shares together, and the total would be subject to all the legacies that are to be paid out of both shares. For it would be in quality of executor that he would reap the profit both of the one and the other.[r]

XIV.

3755. *If the Legatee of a Conditional Legacy succeeds to the Executor, if the Legacy takes Effect, it will not diminish the Falcidian Portion of the Legacies left by the said Executor.* — If an executor who is charged with a conditional legacy had instituted the legatee for his executor, and the condition on which the said

[q] *L.* 22, *D. ad leg. Falc.*; — *v. l.* 78, *D. de hæred. instit.*; — *l.* 15, *D. de his quæ ut ind.*
[r] *L.* 11, § 7, *in f. D. ad leg. Falc.*; — *l.* 20, *C. de jur. delib.*

legacy depended did afterwards come to pass; since the benefit which this legatee would have by the said legacy would accrue to him by the title of legatee, and not by that of successor to the executor who was charged with the legacy, what he gets by it would not augment the fund for payment of the legacies with which he had been charged by the executor to whom he succeeds, and would not diminish the Falcidian portion, if it took place.[s]

XV.

3756. *The Charge imposed on one of the Executors concerns him alone for the Falcidian Portion.* — If a testator had charged one of his executors to acquit out of his share of the inheritance a debt owing by the deceased, the diminution of the goods which the payment of the said debt would occasion would, in the computation of the Falcidian portion, regard only that share of the inheritance which belongs to that executor who is charged with the payment of the debt,[t] and would augment his Falcidian portion in proportion.

XVI.

3757. *The Legacy of which the Delivery or Payment is deferred, is of less Estimation for the Falcidian Portion.* — If there were a devise of some land or tenement which was not to be delivered to the devisee till after a certain time, the profits thereof in the mean while accruing to the executor; or a legacy of a sum of money, which was not to be paid till after some time; it would be necessary to deduct out of the estimation of the said legacies for the Falcidian portion so much as the delay of the delivery or payment would take off from what the legacies would have been worth, had they been immediately due at the time that the succession fell; at which time an estimate ought to be made of the goods of the succession, and of the legacies.[u]

XVII.

3758. *The Executor who has paid, or promised to pay, the whole Legacy, has no Claim to the Falcidian Portion.* — The executor who, without retaining the Falcidian portion, had voluntarily obliged himself to acquit a legacy entirely, without any abatement,

[s] *L. 4, D. ad leg. Falc.* [t] *L. 8, D. ad leg. Falc.*

[u] *L. 45, D. ad leg. Falc.; — l. 73, § 4, eod.* See the fourth article of the second section of the *Trebellianic Portion*. See the sixth article of the second section.

or had actually paid it, could not afterwards pretend to deduct the Falcidian portion; for he would have renounced his pretensions to it by paying in this manner, or by engaging to pay the whole legacy. And it would be presumed that he had done so with no other view but to satisfy fully and amply the dispositions of his benefactor: which presumption would be sufficient to make the payment or delivery of the thing bequeathed to subsist.[x]

XVIII.

3759. *Unless he paid, or had promised to pay, by an Error in Fact, and not in Law.* — If it was through some error in fact that the executor had acquitted an entire legacy without deduction of the Falcidian portion; as if he had paid it before he knew of a codicil containing other legacies which gave occasion to a defalcation; he might recover what he had paid more than he ought. But if it was through an error in law that he had paid too much, as if he had acquitted a legacy which he thought was not subject to the Falcidian portion; or was ignorant that he had a right to retain it; he could not afterwards pretend to make any defalcation.[y]

XIX.

3760. *The Falcidian Portion is not lost by the bare Effect of Time.* — The executor is not deprived of the Falcidian portion by the effect of time, whilst things are still entire, that is to say, that he has done nothing by which he is deprived of it; as he would be if he had voluntarily acquitted, or obliged himself to acquit, the legacy. But whilst he remains debtor of the legacy, he preserves his right of retaining the Falcidian portion; or if, having acquitted the legacy, he had compounded and taken security for preserving the Falcidian portion, he could not lose it but by the time of prescription which would set aside a debt of another nature.[z]

XX.

3761. *The Falcidian Portion of several Legacies due to one and the same Legatee may be retained out of that which is last paid.* — If an executor who is charged with divers legacies to one and the

[x] *L.* 1, *C. ad leg. Falc.*; — *l. ult. in f. C. eod.* See the second article of the second section of the *Trebellianic Portion.*

[y] *L.* 9, *C. ad leg. Falc.* See the second article of the second section of the *Trebellianic Portion.* See the first section of the *Vices of Covenants.*

[z] *L.* 58, *D. ad leg. Falc.*

same legatee had acquitted some of them without retaining the Falcidian portion out of them, he might retain it for all the legacies out of those which he had not as yet paid: and it would be the same thing, with much more reason, if, in the case of a legacy of a sum of money, or other thing, he had paid one part of it without deducting the Falcidian portion of that part which he had paid: for in all these cases it would be presumed, that, having in his hands stock enough for the total sum of the Falcidian portion, he had reserved the deduction of it to be made out of what remained to be acquitted, either of one sole legacy, or of many. So that this remainder would be answerable to him for it, unless the payments which he had made should imply some engagement that ought to deprive him of the Falcidian portion.[a]

XXI.

3762. *The Executor who, under Pretext of the Falcidian Portion, delays to acquit the Legacies, will be liable for Interest, if the Falcidian Portion is not due.*— The executor who, under pretext of the Falcidian portion which he had no right to pretend to, had deferred to acquit the legacies, would be obliged to pay interest for the time of this delay, which would have no other cause than his own knavish dealing.[b]

[a] *L.* 16, *D. ad leg. Falc.*; — *d. l.* § 1.
[b] *L.* 89, § 1, *D. ad leg. Falc.*; — *v. l.* 2, *C. de usur. et fruct. legat.*

[By the word *executor*, as used in this title, the translator means what he has elsewhere denominated the *testamentary heir*. See Book 3, Title 1, Section 1. — Ed.]

BOOK V.

OF SUBSTITUTIONS AND FIDUCIARY BEQUESTS.

3763. The word *substitution*, in general, hath two significations, which it is necessary to distinguish. The one comprehends the dispositions of testators, who, having instituted an executor, and fearing lest he should be either incapable of the office, or not willing to accept it, name another person to be their executor in default of the former. The other comprehends the dispositions of testators who have a mind that their goods should pass from one successor to another, so as that he who is called in the first place, having succeeded to the estate, may transmit it after his death to the second; and if there be several called to the succession, that the estate may pass from the one to the other successively and gradually.

3764. The first of these two sorts of substitutions is that which is called *vulgar*, from the name which it had in the Roman law, because the use of it was frequent, in order to prevent the cases where it might happen that the executor instituted in the first place might not succeed; as if he should chance to die before the testator; if he should renounce the inheritance; if he was incapable of succeeding; if he rendered himself unworthy of it. And because in these last two cases, and in many others, the exchequer seized upon what the executor or legatee were incapable of acquiring, the fear of this event obliged the testators to make vulgar substitutions.[a] And even the fear of the executor's renouncing the inheritance might likewise induce many testators to make use of this kind of substitution: for before that Justinian had established the benefit of an inventory, the executor having no medium between accepting the inheritance purely and simply, and renoun-

[a] *L. un. in pr. C. de cad. toll.*; —*v. Ulp. tit.* 17; —*l.* 1, *D. de jur. fisc.*

cing it, the difficulty of knowing exactly the state of the goods, which made it necessary to give to the executors whole years to deliberate in, and which was attended with the inconveniences that have been remarked in the preamble of the third title of the first book, might oblige many executors to renounce the successions.

3765. The other kind of substitution, which makes the goods to pass from one successor to another, is that which was properly called *fideicommissum* in the Roman law, a fiduciary bequest, because the use of it was frequent by dispositions in terms of entreaty, by which the testator requested his executor to restore either the whole inheritance, or some particular thing, to the person whom he named, leaving it wholly to the conscience of his executor whether he would fulfil his will or not. These fiduciary bequests did at first depend on the integrity of the executors;[b] but afterwards they had the same force and efficacy as the other dispositions of the testator's;[c] and the use of them was very frequent, as well as that of vulgar substitutions. But the word *substitution*, in the Roman law, is more particularly applied to vulgar substitutions; and the fiduciary substitutions are hardly known there, except under the name of *fideicommissum*, or fiduciary bequest; for one could not substitute in this manner so as to make the estate to pass from one successor to another, unless by expressions conceived in terms of entreaty, or others of the like nature, of which mention has been made in the fourth section of *Testaments*, and not in terms direct and imperative,[d] of which we have also spoken in the same place, and which it is not necessary to repeat here. It sufficeth to remark on this subject, that by the Roman law it was only fathers that could substitute in this manner in direct terms to their children, who were under the age required by law for the making of a testament, and were under their father's authority; which was done by that substitution which is called *pupillary*, of which we shall have occasion to speak hereafter: and soldiers, who could moreover substitute in the same manner to their children who were of age sufficient to make a will,[e] as also to other executors besides their children.[f] And these substitutions had in these cases the effect of fiduciary bequests.

[b] § 1, *Inst. de fideicom. hæred.* [c] *D.* § 1, *Inst. de fideicom. hæred.*
[d] *L.* 7, *D. de vulg. et pupill. subst.*; — § *ult. Inst. de pupill. subst.*
[e] *L.* 15, *D. de vulg. et pupill. subst.*; — *l.* 6, *C. de testam. milit.*
[f] *L.* 41, *D. de testam. milit.*

But by our usage, it is indifferent whether the testator expresses himself in direct imperative terms, or in terms of entreaty; and in what manner soever a substitution is conceived which makes the estate to pass from one successor to another, it hath its effect if the intention of the testator is fully explained. And these sorts of dispositions are called either by the name of *fiduciary substitutions*, because of the origin which they had in the Roman law by the use of fiduciary bequests, or by the name of *gradual substitutions*, because they make the estate to pass to the substituted persons one after another in several degrees. And they are likewise called purely and simply substitutions; so that in our common usage the bare word *substitutions* is understood of those of this last kind, because they are much more frequent than either the vulgar or pupillary substitution; and in what manner soever they be conceived, whether in terms of entreaty, or in terms direct and imperative, they have, as we have just now said, the same effect.

3766. It is to be observed in relation to these substitutions or fiduciary bequests, that they may be imposed, not only on the executor, if the substitution be of the whole inheritance, or of a part of it, or of a certain land or tenement that is left to him, but also on a legatee, if the testator intends that the thing bequeathed should pass to another successor, as shall be explained in its place.[5]

3767. We see that there is this difference between these fiduciary bequests and vulgar substitutions, that in these there is only one successor who succeeds immediately to the testator; for if he who is instituted executor may and will succeed, the substitution will be without effect: and if the executor who is called in the first place do not succeed, the person substituted will be the first executor, who will succeed immediately to the testator; and although there have been several called and substituted, the one in default of the others, yet the first to whom the succession does accrue excludes all the others, and the substitution is annulled from the moment that one of them has been executor. But in the fiduciary bequests, he who is substituted succeeds after the executor; and if there be several of them called successively, every one of them has the right to succeed after the other; and the goods which are subject to the fiduciary substitution pass from

[5] See the second section of the third title of this fifth book.

the one to the other by degrees, according as the persons are called to the said substitution. And seeing this sort of substitution hath the effect to preserve estates in families, the usage of it is frequent in the provinces of France which are governed by the written law, not only in families of quality, but likewise among the inferior sort of people.

3768. We must also take notice of another sort of substitution which is likewise in use in the provinces of France which are governed by the written law, which is called *pupillary substitution*, because it is made by a father, who, having a child under the age required for making a will, and under his authority, ordains that, if the said child does not succeed as executor to him, or if he does succeed, and happens to die before he arrives at the age necessary for making a will, the person substituted should succeed in his place. Thus this substitution implies the two others, for it hath these two effects: the first of the vulgar substitution, which is to call the substituted executor to the succession of the testator, in case his son should not be his executor; and the second of the substitution which makes the estate to pass from the one degree to the other, seeing it makes the estate to pass from the person of the son to that of the substitute. And the Roman law hath likewise given to this pupillary substitution a third effect, which is to make, not only the goods of the father's succession to pass to him who is substituted executor, but also the goods of the son to whom the father has substituted, if it should happen that he had left other goods besides those that came to him from his father. Thus the testament of the father, which contains a pupillary substitution, is considered as containing two testaments, that of the father and that of his child; the law permitting the father, who makes his own testament, to make at the same time one for his son, who is incapable of making a will before he attains the age of puberty. Which is the reason why this substitution is annulled as soon as he to whom his father hath substituted in this manner hath attained the age of puberty.

3769. It is these several kinds of substitutions that shall be the subject-matter of the four titles of this fifth book; in the first of which we shall treat of the vulgar substitution; in the second, of the pupillary; in the third, of substitutions direct and fiduciary; and in the fourth, of a right which is called the Trebellianic portion, which is to executors who are charged with a substitution the same thing as the Falcidian portion is to executors who are overburdened with legacies.

TITLE I.

OF VULGAR SUBSTITUTIONS.

3770. In this title we shall treat only of the substitution that is purely vulgar, and which is not joined to the pupillary substitution; and we reserve to the following title that which relates to these two substitutions when they are joined together.

SECTION I.

OF THE NATURE AND USE OF VULGAR SUBSTITUTION.

Article I.

3771. *Definition of Vulgar Substitution.* — Vulgar substitution is an institution of an executor who is called in default of another, who either cannot or will not take upon him that quality.[a]

II.

3772. *As soon as the Executor accepts, the Vulgar Substitution ceases.* — If the person who is instituted executor, and is called in the first place to succeed to the testator, enters to the succession, the vulgar substitution is annulled: for it ought not to take place, except in the case where the first executor does not succeed. Thus, the right of the substituted executor becomes useless from the moment that the person who is instituted executor makes use of his right.[b]

III.

3773. *One may make several Degrees of a Vulgar Substitution.* — One may substitute, not only a second executor in default of a first, but a third in default of a second, and likewise others in several degrees.[c] And he is said to be instituted executor who is called in the first place, and the others are the substituted executors, one in default of the other, every one in his degree.[d]

[a] Lucius Titius hæres esto, si mihi Lucius Titius hæres non erit, tunc Scius hæres mihi esto. *L.* 1, § 1, *D. de vulg. et pup. subst.*

[b] This is a consequence of the definition of this substitution.

[c] *L.* 36, *D. de vulg. et pup. subst.*

[d] *L.* 1, *D. de vulg. et pup. subst.* Although the rule explained in this article, which was

IV.

3774. *One may substitute either many to one, or one to many, and the Coexecutors to one another.* — As one may institute several executors, so likewise one may substitute to them in one or more degrees, and differently, naming either to every one of them a particular substitute, or one only substitute to them all, or many substitutes to one, and diversify the number of the degrees, and of the persons of the substitutes. And one may also substitute the coexecutors reciprocally to one another.[e]

V.

3775. *One may substitute to a Legatee.* — One may substitute, not only to an executor, but also to a legatee, so as that, if he either cannot or will not acquire the legacy, the same may go to him whom the testator shall have substituted in his place.[f]

SECTION II.

RULES PECULIAR TO SOME CASES OF VULGAR SUBSTITUTIONS.

ART. I.

3776. *Among Coexecutors mutually substituted to one another, the Shares of the Substitution are the same with those of the Institution.* — If a testator, having instituted several executors in unequal portions or shares of the inheritance, substitutes them reciprocally to one another, every one of the substitutes, if the case does happen, will have such part in the substitution as is proportionable to the share which he had in the institution, unless the testator regulates it otherwise. Thus, for example, if an executor is instituted for a moiety of the inheritance, another for a third, and another for a

of frequent use in the Roman law, for the reason remarked in the preamble of this book, may seem not to agree with our usage, it being neither necessary nor usual with us to make such a provision of executors; yet it might happen that a testator, who should chance to have for his next of kin only strangers that were not naturalized, might institute them executors in this manner, that the succession might go to whichsoever of them should happen to be naturalized, and capable of succeeding him, at the time of his death.

[e] *L.* 36, § 1, *D. de vulg. et pup. subst.* The same remark may be made on this article which has been made on the preceding, that it is a difficult matter in our usage for one to have occasion for making such like dispositions.

[f] *L.* 50, *D. de legat.* 2.

sixth part, and the executor who was to have the moiety does not succeed, he who was to have the third having the double of what he who had only a sixth part was to have, this last executor will have only a third part of the inheritance, and the other will have the two thirds.[a]

II.

3777. *The Reciprocal Substitution among Coexecutors is restrained to the Survivors, when the Case happens.* — If in the case of several executors instituted, and reciprocally substituted to one another, some of them renounce the inheritance, they will by that means be excluded from the substitution; and if the case of the substitution does happen, it will be only for the benefit of those who shall have accepted the executorship. But if it should happen, that, in the case of several executors substituted to one another, some of them having accepted the succession, one of the number dies before that another, who renounces the succession, declares his intention so to do, his renunciation, which would make way for the substitution for the share of the inheritance that he was to have, would make it go only to the surviving executors. And those who should happen to be dead before the said renunciation, having had no part in the substitution, which was not open till after their death, would transmit nothing thereof to their heirs or executors.[b]

III.

3778. *He who is substituted to the Substitute is substituted likewise to him who is instituted.* — If a testator institutes two executors in the first degree, and substitutes them reciprocally to one another, or only one of them to the other, and substitutes a third person to the coexecutor who is substituted; the substitution of this third person will have this effect, that he will be substituted for the whole, if the case happens that neither of the two coexecutors succeeds.[c]

[a] *L.* 24, *D. de vulg. et pup. subst.*; — *l.* 8, *in f. eod.*; — *l.* 5, *eod.*; — *l.* 1, *C. de impub. et al. subst.*

[b] *L.* 23, *D. de vulg. et pup. subst.*; — *l.* 45, § 1, *eod.*; — *l.* 10, *eod.* We have put down no example in the article, it being easy for every person to frame one to himself, and the rule may be easily understood without any example.

[c] *L.* 27, *D. de vulg. et pup. subst.* See the sixth article of the ninth section of *Testaments.*

IV.

3779. *The Institution of one of two, whichsoever of them shall survive, implies the Substitution of the Survivor to the Person who dies first.* — An institution of two executors may be conceived in terms which imply a reciprocal substitution to one another, although the testator has not expressed the substitution, nor made any distinction of first or second degree; as if he had named two of his friends, calling to his inheritance whichsoever of the two should survive him: for, as both the one and the other would succeed, if they should happen to be both alive at the time of the death of this testator, so the death of one of them leaves the succession entire to the other, in the same manner as if he had been expressly substituted. And it would be the same thing between two legatees, called to a legacy by a disposition of the like nature.[d]

V.

3780. *If the Substitute dies before the Case of the Substitution, he does not transmit his Right to his Heir or Executor.* — Since the substituted executor has no right to the inheritance, except in the case where he who is instituted in the first place does not succeed; if it therefore so falls out that the substitute dies before the first executor has declared his mind, whether he will accept the executorship or refuse it, he dies without any right to the inheritance, and consequently transmits no right to his heirs or executors.[e]

VI.

3781. *He who is substituted to one of the Coexecutors is preferred before the Coexecutor who has the Right of Survivorship.* — If, in the case of two or more executors, there were one of them to whom the testator had substituted another person, and he who had a substitute died without succeeding, his right would go to the substitute: for although the coexecutors have the right of accretion or survivorship, yet this right gives place to the substitution, which, by the choice of the testator, prefers before them the person who is substituted.[f]

[d] *Ll.* 24, 25, *et* 26, *D. de hæred. inst.*
[e] *L.* 81, *D. de acq. vel omitt. hæred.*
[f] *L.* 2, § 8, *D. de bonor. poss. sec. tab.*

VII.

3782. *Among Coexecutors, he who has accepted one Share of the Inheritance cannot renounce the Shares which fall void.* — If, several executors being substituted one to another, some of them accept their portions of the inheritance, they will have also the shares of those who shall renounce, and they cannot refuse them.[g] For the inheritance cannot be divided, and it passes whole and entire to whomsoever has any portion of it, if he be left all alone.[h]

VIII.

3783. *An Executor substituted to himself.* — It might so happen that an executor might be substituted to himself, if, in case of his not being able to succeed by a first institution, he were called to the succession by a second institution, which might have effect. Thus, for example, if a testator had instituted an executor, in case he were of age at the time of the testator's death, and had added, that, if this institution should be without effect because the condition thereof was not accomplished, the same executor should succeed to him, provided he were at that time free from the paternal authority; this executor might succeed by this second institution, if, the condition of the first institution failing, it should happen that at that time he was free from the paternal authority, although he were a minor.[i]

Remarks on the Preceding Article.

3784. It was in doubt whether a decision which seems to be of so little use as that which is explained in this article ought to be placed among the others, seeing it is in a case which seems hardly possible to fall out in the manner as it is explained in the text cited on this article. For it is supposed in this text that a testator, having instituted an executor under a condition, adds afterwards, that he substitutes him purely and simply, without a condition. It would seem that such a disposition could be nothing else than the effect of some strange, fantastical humor. For it would be more simple and more natural not to impose on the executor a condition with which he dispenses at the same time, than to im-

[g] *L.* 6, *C. de impub. et al. substit.*

[h] See the twelfth article of the first section of *Heirs and Executors* in general, and the sixth article of the ninth section of *Testaments.*

[i] *L. ult.* § 1, *D. de vulg. et pup. subst.*

pose this condition by a first clause, and to discharge him of it by a second. This consideration has induced us to put down in the article a case that is different, and that gives the same view as was intended to be given in this text of a case where a person is substituted to himself, that is to say, of a case where one is called to the inheritance in two manners, one of which failing, the other may have effect; which may give an idea of the distinctions which ought to be made in certain cases of different rights which one may have to one and the same thing by divers views, or by divers titles which it may be necessary to distinguish. And it is because of the use of these sorts of distinctions, that we resolved to add this article to the others.

3785. It may be remarked on these sorts of cases, where a person is, as it were, substituted to himself, that an institution of this kind implies, as it were, two alternative conditions, that in default of the first condition the second may make the institution to have effect.

TITLE II.

OF PUPILLARY SUBSTITUTION.

3786. It is not necessary to repeat here what has been said of pupillary substitution in the preamble of this fifth book. If any one should find fault, that we have not inserted in this title the rule of the Roman law which says that the pupillary substitution transmits to the substitute all the goods of the child to whom he is substituted, even to the exclusion of the mother of the said child from her legitime or legal portion of the same;[a] he may see what has been said on this subject in the *Treatise of Laws*, chap. 11, no. 24, and the remark on the eleventh article of the first section of this title. We were of opinion, for the reasons there explained, that the hardship of that law was inconsistent with equity, which is the spirit of ours; seeing, in order to favor the liberty of testaments, it gives in the case of this substitution such a latitude to them as makes the first sentiments of the law of nature give place to a mere nicety. For it is agreeable to the law of nature, that the

[a] *L.* 8, § 5, *D. de inoff. testam.*

mother who survives her son should have a share of his goods; and it is inhuman to strip her of them in order to make them go to a stranger, and that upon no other ground than because it is not the child himself who does this injustice to his mother, but that it is his father, whom the law hath empowered to make the testament of his child, who is not of age sufficient to make one for himself: as if the power of making the testament of a child implied a right to make it such as an enemy to the mother of the said child would make it, and that the father making a testament for his son might make for him such a disposition as would have been reckoned inhuman had it been made by the son himself. Justice may surely be administered without the help of such rules. However, these sorts of subtilties were accounted so good reasons in the spirit of the Roman law, that they were called *benign interpretations;* an example whereof we see in another case, and against a mother. It is in the case likewise of a pupillary substitution made by a father in a codicil. The person who was substituted demanded the goods in opposition to the mother, who alleged that the substitution was null, and it was so in fact; for the father could not substitute by a codicil. But the benign interpretation was against the mother, and this disposition, which could not be valid as a substitution in a codicil, was confirmed as a fiduciary bequest,[b] by a nicety which has been explained in the fourth section of *Testaments.* One might imagine in these two cases, that it was as just to prefer in them the mother to the substitute, and the law of nature to niceties, as in another case where the authors of those very niceties made them give way to this natural law, which ought to give the preference to the mother before the substitute. It was in a case where a testator, leaving his wife big with child, had instituted her his executrix for one moiety of his estate, and his posthumous child for the other moiety; and appointed, in case the posthumous child should not be born alive, that another person whom he named should be his executor. The posthumous child was born, and died before he was of age sufficient to make a will. This event called the said substitute by the terms of the substitution; but because the father had instituted his wife together with this child, the same lawyer who had decided that the pupillary substitution excludes the mother from her legitime, or legal portion, determined in this case that, the father hav-

[b] *L.* 76, *D. ad senat. Trebell.*

ing instituted the mother jointly with his child, it was to be presumed that it was much more his intention that the mother should succeed to the child. And Justinian adds to this reason, that, the mother having survived her child, the substitution ought not to take place, and that the mother ought to exclude the substitute.[c] This reason might very well have induced them to decide the case in question in the same manner; and the same justice required, not only that the mother should not be deprived of her legitime or legal portion, but that she should even be preferred for the whole succession to the substitute, upon this presumption, which is so natural, that the father who substituted a stranger to his son that was an infant presupposed that the mother would die first, and that, if he had foreseen that she would have outlived her son, he would not have made such a substitution.

SECTION I.

OF THE NATURE AND USE OF PUPILLARY SUBSTITUTION, AND OF THOSE SUBSTITUTIONS WHICH ARE COMMONLY CALLED EXEMPLARY, COMPENDIOUS, AND RECIPROCAL.

ART. I.

3787. *Definition of Pupillary Substitution.* — Pupillary substitution is a disposition made by a father, who, having a child under age, and subject to his authority, institutes him his executor, and substitutes to him another person to succeed to him in default of the said child, in case he should not be executor to his father; or if he should succeed also to the said child, in case he should die before he were of age sufficient to make a will.[a]

II.

3788. *One may substitute to a Posthumous Child.* — One may substitute in this manner, not only to a child who is already born, but also to a posthumous child, who should be under the power of the testator if he were born.[b]

[c] *L. ult. C. de instit. et substit.*
[a] *Inst. de pupill. subst.* See the text cited on the following article.
[b] *L. 2, D. de vulg. et pupill. subst.*

III.

3789. *The Pupillary Substitution comprehends the Vulgar.* — The pupillary substitution implies two different substitutions, and for that reason it is said to be twofold. The first calls the substitute in case the child does not succeed to his father, which is the case of the vulgar substitution. And the second calls the substitute in case, that, the child having succeeded to his father, he chances to die before he attains the age of puberty; which is the case like to a fiduciary bequest, which makes the succession to pass from one executor to the other. And when a father makes a pupillary substitution, it comprehends both the one and the other case.[c]

Remarks on the Preceding Article.

3790. The rule explained in this article is not founded on the nature of these two sorts of substitutions; for their characters and their use are wholly different; and there is no essential connection between the one and the other. But what occasioned in the Roman law that the expression of the one comprehended both, as is said in the second of these texts, was the frequent use of these two sorts of substitutions that were joined together. And the constitution of those emperors, of which mention was made in the second text, and which was in all probability a consequence of that usage, established the same into a fixed rule.

3791. It may be remarked on this article, that it is not there said that the expression of one of these substitutions comprehends likewise the other, as it is said in the second of the texts cited on this article, but only that the pupillary substitution comprehends both. For if, for example, a testator, having instituted his son that was under fourteen years of age, had added, that, in case the said child should die before him, such a one should be his heir or executor, it would seem that according to equity one might question whether this substitution ought to have the effect of calling this substitute, in case that the said child, having outlived and succeeded his father, had died before he arrived at the age of puberty, and whether it would not be a slavish observance of the niceties of the Roman law, if we should give to the said substitution this effect in the like case. For this testator having clearly explained himself as to the case where the child should die before him, his expression would seem to have no other extent than to that single case which

[c] *L.* 1, § 1, *D. de vulg. et pup.*; — *l.* 4, *eod.*

he had expressed, especially if we suppose, as it is natural to suppose of almost all testators, that he who made such a disposition was ignorant of the connection which the Roman law made between the vulgar substitution and the pupillary. And we see even in a law, that although the vulgar substitution to a son under age comprehends the pupillary, yet that it is to be understood only of the cases where it does not appear that the intention of the testator is contrary. *Si modo non contrariam defuncti voluntatem extitisse probetur.** But if a testator had substituted after the pupillary manner to his son under age, without explaining himself in any other way, one might think that, having made use of that indefinite expression, his intention was that it should be taken in the sense which the laws give it.

IV.

3792. *The Pupillary Substitution comprehends the Goods of the Child.* — Of these two substitutions, the first, which is the same with the vulgar, makes the person who is substituted to be immediate heir or executor of the father, if the child does not succeed; and the second transmits to the substitute, not only the goods of the father, if the child has succeeded to him, but also all the goods that may accrue to the child in any other manner of way.[d]

Remarks on the Preceding Article.

3793. This effect of the pupillary substitution, to transmit to the substitute the proper goods of the child, was a consequence of the extent which was given by the Roman law to the paternal authority, and of the rule which, as is mentioned in the following article, makes the father's testament to be considered as the testament of the son. It may be said of this rule, that it derives its authority only from a mere positive law, which has no essential connection with natural equity, and is even in some measure opposite to the principle of equity, which calls the heirs of blood to successions, and makes their condition more favorable than that of the testamentary heirs, as hath been remarked in other places.* So that it seems not to agree with the spirit of the general law of this kingdom, which is far from countenancing these niceties. And although the same be observed in many places, yet we have

* *L. 4, C. de imp. et al. subst.*

[d] *Instit. de pupill. subst.*

* See the eighth article of the preface to this book.

thought proper to make this reflection here for the use of other provinces which are governed by the written law, but where these sorts of dispositions of the Roman law are not observed in so literal a sense, because of the mixture they have in the said provinces of their own customs and the written law together. And I may venture to say, that there would arise no manner of inconvenience from the non-observance of this rule, which strips the heirs of the child who dies before he is of age to make a will, not only of the goods which he had by descent from his father, but of the child's own proper goods, to make them go to the substitute, and especially in the cases where a testator was ignorant of this effect of a substitution which he had made to his son under age, without any other view than that which he would have had in substituting to a child that had attained the age of puberty.

V.

3794. *So that it contains Two Testaments, that of the Father, and that of the Child.* — It follows from these rules, that the testament of the father, who makes therein a pupillary substitution, disposes of two different successions, and contains, as it were, two testaments, that of the father, who disposes thereby of all his own goods, and that of the child. For the pupillary substitution transmitting to the substitute both the goods which the child has had of his father, and likewise those which he has acquired otherwise, it has the same effect as an institution would have which the said child should have made in favor of this substitute, if he had been capable of making a testament.[e]

VI.

3795. *One cannot substitute after the Pupillary Manner to a Child that is not in his Power.* — If the child under age were out from under the jurisdiction of his father, as if he was emancipated, the father could not substitute to him after the pupillary manner.[f] For the right of making such a substitution is granted only to the paternal authority, and is not a bare effect of the incapacity of making a testament, under which the child labors who is not arrived at the age of puberty.

[e] § 2, *Inst. de pup. subst.*; — *l.* 2, *D. de vulg. et pup. subst.* See the remarks on the preceding article.

[f] See the text cited on the second article.

VII.

3796. *This Substitution ends when the Infant attains the Age of Puberty.* — The pupillary substitution remains in suspense until the infant has attained the age of puberty, or dies before he arrives at it. But as soon as he attains the age of puberty, this substitution is annulled; so that although he should die immediately after, even without making a will, yet the substitute would have no share in his goods, nor in those of the father.[g]

VIII.

3797. *Substitution to a Child in a State of Madness, which is called Exemplary.* — Those who have children or grandchildren that are mad may substitute to them as to children under age, although they be of age sufficient to make a will. And it is this substitution that is commonly called *exemplary*, because it has been invented after the example of the pupillary, which it imitates in this, that madness putting the children into a condition like to that of children under age, as to what relates to the incapacity of disposing of their estates, the law gives to fathers the power of making a will for them, and of disposing in favor of a substitute, even of the legitime or child's part of their own inheritance, which they are obliged to leave to those children who are in a state of madness, as well as to their other children.[h]

IX.

3798. *None are called to this Substitution besides the Children or Brothers of the Heir or Executor who is Mad.* — If those children who are in a state of madness had children who did not labor under the same infirmity, one could not substitute to them other persons besides their own children.[i] And if, having no children, they had brothers, the substitution could not be made in favor of other persons than those very brothers, or some of them.[k]

X.

3799. *If the Madness ceases, the Substitution is at an End.* — If the madness should chance to cease, this substitution which had no other foundation would cease also, even although he to whom the father had substituted in this manner had made no testament,

[g] § 8, *Inst. de pupill. subst.*
[i] *L.* 9, *C. de imp. et al. subst.*
[h] *L.* 9, *C. de imp. et al. subst.*
[k] *D. l.* 9, *in f.*

but by the bare effect of his recovery of his senses. For it would be justly presumed that, not having been willing to make a testament when he could, his intention was to have no other heirs but those of his blood; and it could not be presumed that he had a mind to approve the testament of his father which preserved the memory of his madness. And much more would the substitution be annulled if he had made a testament in a lucid interval, although his madness did afterwards return upon him.[l]

XI.

3800. *A Mother and other Ascendants may make this Sort of Substitution.* — Seeing substitutions to children who are in a state of madness are not only a bare effect of the authority which the paternal power gives, but an office of humanity which parents may exercise towards their children; all the ascendants, and even mothers, may substitute in this manner.[m]

Remarks on the Preceding Article.

3801. We have endeavoured to distinguish and to explain, in these eighth, ninth, tenth, and eleventh articles, all that there is in the ninth law of the Code *de impub. et al. subst.* relating to this exemplary substitution, without touching on a difficulty which has divided some interpreters, and of which we shall take notice here. It is said in this law, as it is put down in the article, that all ascendants, and even the mother, may substitute to their children which are in a state of madness. And it does not appear that in this law any distinction is made between the effect of such a substitution made by mothers, or other ascendants, who have not under their power the child to whom they substitute, and that which is made by a father who has the said child under his power. This has induced some interpreters to be of opinion, that, as the substitution made by the father hath its effect in both the cases explained in the third article, that is to say, in the first, if the child

[l] *L.* 9, *C. de impub. et al. subst.* See the fourth article of the second section of *Testaments*.

[m] Humanitatis intuitu parentibus indulgemus, &c. *L.* 9, *C. de impub. et aliis subst.* This word *parentibus* takes in the father and the mother; and these other words of the same law, *parenti qui vel quæ testatur*, comprehend expressly the mother.

We do not put down here among the rules of these several sorts of substitutions that of the Roman law, which we see in the forty-third law, *D. de vulg. et pup. subst.*, touching a substitution, which one could make by permission from the prince to a child who was dumb: for these sorts of permissions are not in use with us.

does not succeed, and in the second, if, having succeeded, it dies before it arrives at the age of puberty; so likewise the substitution of the mother to her child which is mad ought also to have its effect both in the one and the other of these two cases. And this opinion seems on one part to be founded on the letter of the said law, which permits all ascendants, and even the mother, to make this substitution after the example of the pupillary; and on the other part, because it was not necessary to grant them a permission to make a substitution in the first of these two cases, which is a vulgar substitution permitted to every body. So that, this law granting unto them without distinction, in the same manner as to a father, leave to make this exemplary substitution, this permission would be useless if it respected only the first case. However, these interpreters have been censured by another, who charges them with having invented of their own head this permission for the second case, to the mother and to the ascendants who have not the child under their power. But we may say that, if they have erred, it is the law itself that has led them into the error. And there would, perhaps, be as much reason to find fault with Justinian, or those who composed this law of his, that they have not conceived it in such terms as might distinguish the substitution of the mother from that of the father, if it had been their intention so to do; seeing this distinction was very easy and very necessary to be made. We may add, in favor of these interpreters, that a certain author has observed, that he who has censured them on this occasion has been himself of their opinion in other places.* But we may do them all that justice, to own that their difference in opinion has been a natural consequence enough of the little exactness that we see in many of the laws of Justinian. And it may be said of this law in particular, that it would seem that, according to the views which those persons ought to have had who were employed to compose it, they have not clearly enough explained their meaning therein. The matter in question was, to give to mothers, and other ascendants, who have not their children under their jurisdiction, a new power to substitute to their children who were mad, and to whom even fathers could not, before this law, substitute in this second case without the permission of the prince. So that, in order to frame this law, the compilers thereof were to give to fathers the power of substituting to their

* *Fabrot. in* § 1, *Inst. de pup. subst.*

children in a state of madness, without this permission from the prince, and to regulate with respect to mothers, and all other ascendants, wherein should consist the new power that was to be given them over and above that of the substitution for the first case, which they had already, as all other persons have. Thus, the matter was to know, first, whether this power should not extend to the substitution for the second case, as well as for the first. In the second place, it was to be considered whether, by granting them this power of substituting for the second case, the said power would comprehend, not only the goods which the child should inherit of the person who did substitute, but also the proper goods of the child, in the same manner as the pupillary substitution made by the father did, and which served as an example for the substitution to children in a state of madness. And in a word, seeing this substitution was permitted to the mother and to all the ascendants, in imitation of the pupillary substitution; if it was not the intention of the compilers of the law that this imitation should be entire, and that they had a mind to set bounds to it, it would have been proper to have expressed them, and not to have left obscurities and ambiguities which divide the most able interpreters.

XII.

3802. *Compendious Substitution.* — As one single expression comprehends two substitutions, the vulgar and the pupillary, as has been mentioned in the third article, so we may by one and the same expression add to these two a third sort of substitution, which is the fiduciary, of which we shall treat in the following title. And it is this manner of substituting that is called *compendious*, the same being conceived in terms which comprehend these three different sorts of substitution; as if a testator, instituting his son who is under fourteen years of age, substitutes to him another person in case he should die before the age of twenty-five years.[o] And these three substitutions have their effect, as shall be shown in the article which follows.

[o] *L.* 15, *D. de vulg. et pup. subst.*; — *l.* 8, *C. de impub. et al. subst.* Although these laws speak only of a compendious substitution made by a soldier in direct terms, and therefore the compendious substitution in the sense of these laws be properly a military substitution founded upon the privilege of soldiers, of which notice has been taken in the preamble of the fifth book, which empowered them to make a substitution in direct terms to their adult children; yet we have nevertheless conceived the rule in terms which take in all persons without distinction. For besides that according to our usage all persons

XIII.

3803. *Effect of the Three Substitutions in the Compendious one.* — Of these three substitutions, comprehended in the said expression of compendious substitution, the first, which is the vulgar, hath its effect only in case that the child be not heir or executor, and it ends as soon as he has succeeded to the deceased. The second, which is the pupillary, hath its effect only in case the child dies before he arrives at the age of puberty, and it ends so soon as he attains that age. And the third, which is the fiduciary, begins only to have its use after that the son, being arrived at the age of puberty, dies within the time regulated by the said substitution.[p]

XIV.

3804. *Difference of the Effects of these Three Substitutions.* — We must observe this difference between these three substitutions, that the vulgar substitution transmits to the substitute the goods of the testator, if his son does not succeed to him; that by virtue of the pupillary the substitute acquires both the goods of the testator and those of his son, if he has succeeded to him; and that the fiduciary substitution is limited to the goods which the son by succeeding to his father inherited of him:[q] which is to be understood according to the rules which shall be explained in the following title.

XV.

3805. *Reciprocal Substitution.* — That is called reciprocal substitution whereby two or more heirs or executors are substituted reciprocally to one another. Thus, a testator may substitute his heirs or executors one to another, either by a simple vulgar substitution, whether it be that he institutes his children that are adult, or under age, or other person; or by a pupillary substitution, if he institutes his children who are under the age of puberty; or by a fiduciary substitution, if he institutes two or more heirs or execu-

may in their dispositions make use of direct terms or others, as has been remarked in the same place, and in the preamble of the fourth section of *Testaments*, and that we ought only to consider in the expressions of testators the intention which is explained by the words they make use of, whatever they be; we give commonly the name of compendious substitutions to such as comprehend the three sorts, whatever terms they be conceived in; whether the testator was a soldier or not, and whether the fiduciary substitution were to determine after the child had attained a certain age, or ought to take place at what age soever the child should happen to die.

[p] See the texts cited on the foregoing article.

[q] See the texts cited on the twelfth article, and the remark on the fourth article.

tors, whether they be his children or others, to succeed to him, and ordains that their shares of the inheritance shall go to those who are substituted, if the cases of the substitution fall out. And one may also make a reciprocal substitution among legatees.[r]

SECTION II.

PARTICULAR RULES CONCERNING SOME CASES OF PUPILLARY SUBSTITUTIONS.

ART. I.

3806. *He who is substituted to an Infant cannot accept one Succession without the other.* — If, in the case of a pupillary substitution, the son who is under the age of puberty, having succeeded to his father, happens to die before he attains the age of puberty, leaving behind him other goods besides those of the succession of his father, he who is substituted to the son cannot divide his right, and accept one of the two successions, and renounce the other; but he must either accept both together, or renounce both the one and the other. For the testator's intention was, that he should succeed both to his son and to him, and he has made only one succession of the two. And although they be in effect two successions, yet the testament being the sole title both for the one and the other, the substitute, who cannot divide his title, cannot likewise take one of the successions without taking also the other.[s]

II.

3807. *Not even although he were Coheir or Coexecutor with the Infant.* — If he who is substituted to an infant was likewise instituted heir or executor with him for some portion of the inheritance, and both the one and the other had entered to the suc-

[r] *L.* 4, § 1, *D. de vulg. et pup. subst.*; — *l.* 37, § 1, *D. de hæred. inst.* Although these texts have not relation to the three kinds of substitution mentioned in the twelfth article, but only to the vulgar and the pupillary, yet nothing can hinder a testator from making a reciprocal fiduciary bequest among his testamentary heirs or legatees. But seeing every reciprocal substitution is only the same with respect to an executor or legatee as with respect to other persons, and that with respect to every person it is at least of one of the three kinds, the reciprocal substitution is not so much a kind of substitution distinguished from the others, as a manner proper to render common to two or more substitutes the same substitution, or substitutions, if there be more than one.

[s] *L.* 10, § 2, *D. de vulg. et pup. subst.*; — *l.* 20, *C. de jur. delib.* See the fourth article of the first section, and the remark that is there made on it.

cession, the case of the pupillary substitution happening afterwards by the death of the son under the age of puberty, the substitute could not renounce the portion of the inheritance of the father which had been acquired by the said son, and which the substitution would transmit to him.[b]

III.

3808. *The Reciprocal Substitution between Two Infants comprehends both the Cases.* — If a father who had two infant children, both under the age of puberty, substitutes them one to another by a reciprocal substitution, without specifying either the case of vulgar substitution, or that of the pupillary, this substitution would comprehend both.[c]

IV.

3809. *The Reciprocal Substitution between an Infant under the Age of Puberty and an Adult Person is only Vulgar.* — If the reciprocal substitution was made by a father between two children, one of whom was past the age of puberty, and the other under it, it would be limited to the case of the vulgar substitution; for there would be only this case common to the two brothers. And seeing the pupillary substitution could not take place with respect to the succession of him who should be adult, and that their condition ought to be equal, the pupillary substitution, which is fruitless for the one, would likewise be so for the other;[d] unless it were that the testator had distinguished them by substituting the adult person to his infant brother, who was under the age of puberty, for both the cases, and the infant brother to the adult brother for the first case, or by expressing otherwise the intention which he might have therein.[e]

V.

3810. *He who is substituted to an Infant under the Age of Puberty, and to another Executor, is substituted to both only in the Case of the Vulgar Substitution.* — If a testator, instituting another executor with his infant son who is under the age of puberty, such as his relict, who is mother to his son, substitutes to both of them another executor, in case it should happen that neither the one nor

[b] *L.* 20, *C. de jure delib.*
[c] *L.* 4, § 1, *D. de vulg. et pup. subst.*
[d] *L.* 4, § 2, *D. de vulg. et pup. subst.*
[e] *D.* §.

the other should succeed to him, this substitute could not pretend that the said substitution were pupillary with regard to the son: for seeing it could not with respect to the mother have any other effect than that of a vulgar substitution, and it being only the same with respect to both, it would be only vulgar with regard to the son.[f]

VI.

3811. *He who is substituted to Two Infants under the Age of Puberty succeeds only to him who dies last.* — If a father of two children who are under the age of puberty, having instituted them his executors, substitutes to them another person, in case that both the one and the other should die before they attain the age of puberty, this substitution will not have its effect, except in the case that they both die under the age of puberty; and the substitute will have no share in the succession of him that dies first. For the intention of the father was, that each of his children should succeed to the other, and that the substitute should not be called to the succession, but in the case where the two brothers should chance to die before they attained the age of puberty.[g]

VII.

3812. *He who is substituted to him who dies last succeeds to both if they die together.* — If, in a like case of two infant children under the age of puberty, the testator had substituted another person to such of the two as should die last; and they both happened to die together, as in a fire, or in a shipwreck, so that it could not be certainly known which of the two died last, or if, in reality, they both died at the same instant, this substitute would succeed both to the one and to the other. For besides that we may look upon him to have died last whom the other did not survive, the intention of the father in calling this substitute to the succession

[f] *L.* 4, *C. de impub. et al. subst.* We must not look upon the rule explained in this article to be an exception to that which has been explained in the third article of the first section. For that of the said third article is naturally confined to the case of a disposition which substitutes only to an heir or executor who is under the age of puberty, and does not extend to a substitution which would call another heir or executor in conjunction with him who is under the age of puberty. Thus, the conjunction of another heir or executor with one who is under the age of puberty makes that the substitution, which is only one and the same with respect to both, and is only vulgar with regard to the other heir or executor, cannot be pupillary with respect to him who is under the age of puberty.

[g] *L.* 10, *C. de impub. et al. subst.*

of him who should die last, and who ought to succeed to the other, was that the two successions should go to him.[h]

VIII.

3813. *The Vulgar Substitution to an Infant under the Age of Puberty is not ended by his Entry to the Inheritance, if he renounces afterwards.* — If a son under the age of fourteen years, to whom the father had substituted another person, having entered to the succession, does afterwards renounce it, either he himself by his own act, or his tutor for him, the vulgar substitution will have its effect. For although, the son having once taken upon him the quality of executor, this substitution seems to have ceased, yet his renunciation of the inheritance puts the things in the same state and condition as if he had renounced from the time of his father's death.[i]

Remarks on the Preceding Article.

3814. Although it be a difficult thing for this case to fall out, that a substitute should be willing to accept of a succession which the son refuses, yet it is not altogether impossible: and besides, the rule shows that the right of the substitute, which seemed to be extinguished by the infant's entering to the inheritance, is not so in reality, and is only in suspense, to revive again in case the son should happen to renounce the inheritance; seeing this case opens the way for the vulgar substitution. Thus, this rule seems to decide in express terms a question which some interpreters say is one of the most difficult, that is, whether the substitution revives when the infant who is under the age of puberty, having accepted the succession, gets himself relieved from the said act, and renounces the inheritance. And it seems likewise to decide another question which they propose concerning pupillary substitution, which is, whether, a son under the age of fourteen years, to whom his father had made a pupillary substitution, having outlived his father, and happening to die before he accepted the succession, the same would go to the substitute, or to the heir at law or next of kin of the said infant son; who would pretend that the case of the substitution had not happened, because, the son having survived the

[h] *L.* 34, *D. de vulg. et pup. subst.*; — *l.* 11, *D. de bon. poss. sec. tab.*; — *l.* 9, *D. de reb. dub.* See the eighteenth article of the first section of the following title, and the remarks on the twelfth article of the second section, *How Children succeed.*

[i] *L.* 44, *D. de re judic.*

father, he would be his heir, *suus hæres*, and have a right to the estate actually vested in him, although he was ignorant of his right; and that by this means he would have excluded the substitute, and transmitted the inheritance to his heir; but since, by the rule explained in this article, the substitute succeeds, even notwithstanding the son's entry to the inheritance, when he is afterwards relieved from the said act, and renounces the inheritance, and by consequence the substitute is not absolutely excluded by the son's entry; so it may be said, that neither is he excluded by the son's surviving the father, when the son does not enter to the inheritance, since before he accepts the inheritance his quality of son and heir at law does not hinder it from being uncertain whether he will be testamentary heir or not, seeing he may renounce his right; and seeing, moreover, it is certain that, when he does renounce, things will be in the same state and condition as if he had never been testamentary heir, for the same reason which makes the heir or executor who only accepts the succession a long time after it has been open to be nevertheless considered as being heir or executor from the moment that the succession was open, as has been said in its place.[a] From whence it follows, that the renunciation of the infant who is under the age of puberty makes the substitute who accepts the succession to be reputed heir or executor, in the same manner as if the substitution had been open at the moment of the testator's death.

3815. We ought likewise to examine here a third question, which is started by the same interpreters, which is to know if the executor to whom the testator hath made a vulgar substitution, happening to die whilst he deliberates whether he will accept or not, will transmit the right of deliberating to his successor, or if the inheritance will go to the substitute. Those who will have the substitution to take place found their opinion on this, that the law which empowers the person who deliberates to transmit his right to his successor[b] is a new law, which ought not to be extended to the case where there is a substitute. But although this be a new law, yet it is a natural and just one; and the testator did not intend that the substitution should deprive his testamentary heir of the benefit of this law, and take from him the right of deliberating; for if his intention had been such, he ought to have

[a] See the fifteenth article of the first section of *Heirs and Executors* in general.
[b] See the eighth article of the tenth section of *Testaments*.

explained it. Thus it would seem that, the testamentary heir dying while he was deliberating, it could not be said that the substitute was called to the succession in this case. And it may be said, on the contrary, that when the testamentary heir dies whilst it is uncertain whether he would accept the inheritance or not, this uncertainty does not strip him of the succession which he had a right to take; but having only suspended his right, and transmitted the right of deliberating to his successor, when the successor accepts the inheritance it is the same thing as if his author had done it; for it is only from him that he derives his right of succeeding. Thus, whether we consider the intention of the testator, who did not design to hinder his testamentary heir from transmitting his right to his heirs, or the equity of the law, which gives unto heirs the right of deliberating, it would seem that the heir who dies whilst he is deliberating ought to transmit his right to his heirs, who by consequence ought to exclude the substitute. From whence it will follow, that every testamentary heir who, having a substitute, dies before he has known that he was instituted heir, or only without renouncing the inheritance, although he has done nothing which shows that he was deliberating whether he should accept or refuse, will transmit his right to his heirs, who consequently will exclude the substitute, provided only that the first heir dies without renouncing the inheritance. For the same law of Justinian which enables every testamentary heir, even although he be a stranger to the deceased, who dies whilst he is deliberating, to transmit his right to his heirs, does likewise declare that every heir who dies within the year which was allowed for deliberating should be presumed to have died whilst he was deliberating,[c] although in reality he had no thoughts of it; which would reduce the cases which make way for the vulgar substitution to two only; one, of the death of the person who is instituted heir before that of the testator; and the other, of the renunciation of the inheritance by the person who is instituted. And this would occasion no great inconvenience in a matter that is not of a very frequent use, and especially considering that this rule hath nothing in it that can be said to be odious or unjust.

[c] *V. l.* 19, *C. de jure delib.*

TITLE III.

OF DIRECT AND FIDUCIARY SUBSTITUTIONS.

3816. The substitutions of which we are to treat under this title are but little known under this name in the Roman law, where the word *substitution* signifies in its genuine and common acceptation, as has been remarked in the preamble of this book, only the vulgar and the pupillary substitution. And as for the substitutions treated of here, that is, those which transmit the goods from the first successor, whether it be executor or legatee, to a second who succeeds after the first, they were called fiduciary bequests, as has likewise been observed in the same place.

3817. It is not necessary to repeat here what has been said in the preamble of this book, concerning the difference between all these several sorts of substitutions, and concerning the distinction that was made in the Roman law between direct and imperative terms, and terms of entreaty and request to the testamentary heir, as to what relates to these substitutions or fiduciary bequests. We presume that the reader has not forgotten the remarks that have been made in the said preamble, and in the fourth section of *Testaments*. And it remains only, in relation to the subject of this distinction, that we should give an account why in this title we have confounded these terms of direct and fiduciary substitutions; which depends on the remark that hath been made in the same preamble, that according to our usage all expressions, both direct and others, are indifferent for all sorts of substitutions; and that with respect to these which are the subject-matter of this title, we call them indifferently either fiduciary bequests, or fiduciary substitutions, or gradual substitutions, or barely substitutions; and that when we mean to speak of vulgar and pupillary substitutions, we distinguish them by these proper names. So that in our usage, when we mention barely substitutions, we mean those which transmit the goods from one successor to another; for the use of these is much more frequent and more known than that of vulgar and pupillary substitutions. And whether these gradual or fiduciary substitutions be conceived in direct terms, as if the testator substitutes such a one, or in terms of bequest and entreaty to his testamentary heir, or to a legatee whom he has a mind to charge with it, they have the same effect that was given by the

Roman law to terms of fiduciary bequests, and of prayer and entreaty, in all sorts of testaments, and to direct terms in the testaments of soldiers, who had the privilege of making use of these terms in substituting, as the father had also in a pupillary substitution, when he substituted to his infant son who was under the age of fourteen, and not emancipated from the paternal authority. So that these two words of direct and fiduciary substitutions have in France the same sense, and signify that sort of substitution which transfers from one successor to another the goods which the testator has made subject to the substitution. And we have had the more reason to use these two expressions without distinction, because under the Roman law, as has been observed in the fourth section of *Testaments*, the use of direct expressions and of expressions by way of prayer and entreaty was confounded, and this difference abolished for the institution of an heir, and for legacies and particular fiduciary bequests, by two different laws, the one of the emperor Constantine,[a] and the other of Justinian;[b] which led naturally to the confounding in the same manner the use of these different expressions in the substitutions of an inheritance, or of a part of an inheritance, and generally in all sorts of dispositions; seeing there is nothing more true than what is added at the end of the law of Justinian's, that laws regard things, and not words: *Nos enim non verbis, sed ipsis rebus legem imponimus.*

3818. Seeing a testator may substitute either to all his estate, or a part of it, or only to particular things, such as a house, a fief, or other thing; we shall explain the rules of these two sorts of substitutions in the first two sections of this title, and in the third some rules that are common to both the one and the other.

3819. It is to be observed in relation to gradual substitutions, by which estates are conveyed to many persons successively, that by the fifty-ninth article of the ordinance of Orleans the substitutions were restrained to two degrees, exclusive of the institution of the first heir or executor; and the said ordinance having occasioned many lawsuits, on account of the preceding substitutions which were to extend beyond two degrees, it was ordained by the fifty-seventh article of the ordinance of Moulins, that the substitutions which were prior to the ordinance of Orleans might be extended to four degrees, and that for the future they should be

[a] *L.* 15, *C. de testam.*

[b] *L.* 2, *C. comm. de legat.*

limited to two degrees. But this ordinance is not observed in some places, where they retain the usage of extending the substitutions, even to four degrees besides the first institution. And this usage has, in all appearance, taken its rise from the hundred and fifty-ninth novel of Justinian, where, in a particular case, he extends the prohibition to alienate the estate out of the family to four generations, although it is done in a dark, ambiguous manner, so as that we cannot clearly collect from thence a general rule which may restrain all substitutions to four degrees. Which may be an effect of the manner in which it is believed that this novel was composed by Tribonian, the same which he made use of with respect to other novels, of which an ancient Greek author says, that he sold them for money to those who stood in need of them, and were willing and able to pay for them.[c]

3820. Besides these ordinances which have regulated the degrees of substitutions, that of the month of January, 1629, has made three other regulations in relation to this matter of substitutions and fiduciary bequests. The first is by the hundred and twenty-fourth article, that the said degrees shall be computed by the number of persons, and not by the stocks. The second is by the hundred and twenty-fifth article, that fiduciary bequests shall not take place in movables, except it be jewels of a very great value. And the third is, that they shall not take place in the testaments of poor country people. But this ordinance has not been strictly observed. And in the provinces which are governed by the written law, all persons without distinction make substitutions of all their goods. And as to the number of degrees, we see that even in the places where they have retained the use of substituting even to four degrees, yet the said number of degrees is extended in such a manner that they are computed, not according to the number of persons, but according to the stocks. Thus several brothers substituted to one another make but one degree; whereas, by that ordinance, each substitute was to be reckoned one degree. And this likewise is the rule in all other places. For the degrees of substitutions are nothing else but the places of the persons substi-

[c] That is to say, that Justinian, in composing his constitutions, which are called novels, took the advice and assistance of Tribonian, — that famous Tribonian, so well known by his cunning and dexterity, and by his avarice, — who, in composing these new constitutions, took money from those whose interests gave the occasion for making the said laws; and he worded them and altered them as they had a mind, making use of expressions that were dark, difficult, and equivocal, such as were capable of several meanings. *Harmenopolus, lib.* 1, *tit.* 1, 10.

tuted, who succeed one after another. Thus, a second son being substituted to his eldest brother, and happening to succeed to him in the fiduciary bequest, makes the first degree in the said fiduciary bequest; and the third brother, who shall succeed to the second, will make the second degree therein. And although it be true that these brothers are among themselves in the same degree of generation, yet there is this difference between the computation of degrees in substitutions and that of degrees in generations, that in these the number of children who are descended from one and the same father is no obstacle to their being all of them in the same degree of generation; and these degrees are not multiplied but by divers generations from father to son, which descend from one to the other by several degrees. But in fiduciary bequests, the persons substituted coming only one after the other, each in his respective order, every one of them makes his own degree independently of the degree of generation which the persons substituted may be in among themselves; and there cannot be two of them in the same degree, except in the case where several substitutes are called jointly to succeed together to the fiduciary bequest at the same time; as if several children were substituted together to their father, that they might share among them the fiduciary bequest after his death. For as they succeeded all together at the same instant, there would be in respect to them all only one change from their father to them; which would make only one degree, which they would make up all of them together.

3821. Besides this regulation which has set bounds to the degrees of substitutions, in order to put a stop to the inconveniences which attend the liberty of substituting without restriction, the ordinances have made another regulation which is of no less importance; which directs that all dispositions, whether they be such as are to have their effect in the lifetime of those who make them, or after their death, which contain fiduciary bequests or substitutions, shall be published and enrolled, to the end that persons who have any thing to transact with the possessors of the goods which are substituted, and others who have an interest therein, may not be imposed upon.[d]

3822. We may add as a last remark, that in our language the word *substitute* is indifferently made use of, either to signify that one person is substituted to another, or that an estate is subject

[d] The edict of the month of May, 1553; — Ordinance of *Moulins*, article 57.

to a substitution. Thus we say that a testator has substituted such a one to his executor, or to a legatee. And we say likewise, that he has substituted or entailed such an estate, such a land.

SECTION I.

OF SUBSTITUTIONS OR FIDUCIARY BEQUESTS OF AN INHERITANCE, OR A PART OF ONE.

ART. I.

3823. *Definition of Substitutions or Fiduciary Bequests.* — A substitution or fiduciary bequest is a disposition which transmits a succession, or a part of one, or certain goods, from the person of the executor or legatee to another successor,[a] after the time regulated by the testament.[b]

II.

3824. *Who may substitute.* — The liberty of substituting is the same with that of instituting executors and bequeathing legacies; and whoever can name executors or legatees may also substitute to them other persons to take one after another the goods which he shall have appropriated to them.[c]

III.

3825. *Divers Ways of substituting to an Inheritance or a Part of one.* — Whether there be only one executor instituted, or whether there be many, the testator may substitute either to the whole inheritance, or a part of it. And if there be several executors, he may restrain the substitution to the portions of some of them whom he shall think fit to charge therewith; leaving the others free to them.[d] And he may likewise either substitute his executors one to another, or substitute only to one of them either one of his coexecutors or other persons; or charge one of his executors to restore the fiduciary bequest to such of the coexecutors as the

[a] § 2, *Inst. de fideic. hæred.*; — *Inst. de sing. reb. per fideic. rel.*

[b] *D.* § *de fideic. hæred.*; — *l.* 16, § 7, *D. ad senat. cons. Trebell.*; — *l.* 78, § 9, *eod.*

[c] The same capacity is required for every disposition that may be made by a testament as for making a testament. See the second section of *Testaments*.

[d] § 8, *Inst. de fideic. hær.*

said executor should think fit to make choice of: and the liberty of this choice which the said executor will have will be noways contrary to the necessity he will be under of restoring the said fiduciary bequest to some other person.[e] But the effect of this liberty will be either to restore it to the coexecutor whom he shall have made choice of, if he makes any choice, or to leave it to all the coexecutors jointly, if he chooses none of them singly.[f]

IV.

3826. *The Substitution is limited to the Goods which the Testator leaves.* — In all the cases where an executor is charged with a substitution, he cannot be obliged to give more than he receives.[g] And if, for example, a testator had requested his executor to institute by his testament another person for his executor, this disposition would be restrained to the goods of the said testator. And although his executor should accept of the executorship, yet he would be at liberty to dispose of his own proper goods.[h] For otherwise this testator would sell his kindness for more than the worth of what he had given.

V.

3827. *The Executor who is charged with a Substitution may retain a Fourth Part of what was left him.* — He who is instituted executor, and charged with a substitution, whether it be of the whole inheritance, if he is sole executor, or of the portion thereof which is left him by the testament, if he is only executor for a part, not only cannot be engaged by a substitution to restore more than what is left him by the testator, but he cannot even be obliged to restore the whole. And as the executor who is charged with a legacy may retain a fourth part of the inheritance for the Falcidian portion, so the executor charged with a substitution may retain a fourth part of the inheritance, if he is universal heir or executor, or a fourth part of his portion, if he is only heir or executor for a part: and it is this fourth part which is called the Trebellianic portion,[i] of which we shall treat under the following title.

[e] *L.* 7, § 1, *D. de reb. dub.*

[f] See the twelfth article of the second section of *Legacies*.

[g] *L.* 114, § 3, *in f. D. de leg.* 1.

[h] *L.* 17, *D. ad senat. Trebell.*; — *d. l.* 114, § 6, *D. de leg.* 1. See the following article.

[i] See the fourth title.

VI.

3828. *The Fruits of the Goods which are substituted remain to the Executor, if the Testator does not otherwise dispose of them.* — The executor, who is charged with a substitution which would oblige him to restore to the substitute all the profit he had made by the goods of the testator, would not be bound to restore the fruits of the inheritance which he had reaped until the time that the substitution was to take place. For these fruits were only a revenue arising from the inheritance, which was his until the case of the substitution should happen. Thus, these fruits having accrued to him, they ought to remain his, unless the testator had otherwise disposed of them.[k]

VII.

3829. *The Executor who is charged to restore all that he has had of the Goods of the Deceased, ought to restore that which he has received, either as a Legacy or otherwise, out of the Inheritance.* — If in the case of the preceding article the executor had received, not only that which belonged to him as executor, but also some legacy which his coexecutor had been charged to pay him, or some advantage which was left him by a disposition of the testator over and above what his coexecutors had; these sorts of advantages would be comprehended in the substitution, which is conceived in such terms as would oblige the executor to restore all that he had received of the goods of the testator, unless his disposition could be interpreted in another sense.[l]

VIII.

3830. *The Substitution may be either to a Certain Time, or upon Condition.* — The testator may not only charge his executor to restore the inheritance to another person at the time of the death of the said executor, but likewise to restore it after a certain time, as at the time when the substitute shall be of full age. And one may also substitute upon condition, as if the substitute were called only in case that he should have children.[m]

[k] *L.* 18, *D. ad senat. Trebell.*; — *d. l.* § 2; — *l.* 57, *eod.* See the following article, and the fourth title. *V. l.* 32, *eod.*

[l] *L.* 16, *C. de fideic.*

[m] § 2, *in f. Inst. de fideic. hæred.* See the texts cited on the first article under the letter *b*.

IX.

3831. *The Executor ought to restore the Fruits of the Fiduciary Bequest from the Time of his Delay, and is also liable to Costs and Damages if there be Ground for such a Demand.* — If the executor who is charged with a fiduciary bequest delays to make restitution thereof after the time or case of the substitution is come to pass, and the person in whose favor the substitution was made has made a legal demand thereof, he will be accountable for all the fruits, the revenues and interest, from the time of the demand, or even from the time that the substitution was to take place, if he had knavishly detained the goods which were to have been delivered by virtue of the substitution, as if he had concealed the testament. And he would be liable also in this case for costs and damages to the person to whom the goods were to be restored, if there were any room for such a demand.[n]

X.

3832. *If the Executor is not in Delay, he is not bound to make Restitution of the Fruits.* — If the substitute to whom the goods were to be restored, knowing nothing of his right, had neglected to demand them of the executor who was charged to restore them, and had suffered him to enjoy them beyond the time at which the restitution ought to have been made, the said executor would not be bound to restore the fruits which he had reaped during that time. For besides that he might look upon the said goods as his own until the person for whom he held them in trust had stripped him of them, he might either doubt of the validity of the substitution, or not know that the same was open, or presume that the person who was substituted to the goods was willing that he should enjoy them.[o]

[n] *L.* 26, *D. de legat.* 3. See the following article. See the fourteenth article. When a party is condemned to pay interest or to make restitution of the fruits, the same is in place of damages; and by our usage no other damages are adjudged except in particular cases where there is notorious knavery, or they be due by the nature of the engagement, as to which the reader may consult the preamble of the title of *Interest, Costs, and Damages.*

[o] Si hæres post multum temporis restituat, cum præsenti die fideicommissum sit, deducta quarta restituet. Fructus enim qui percepti sunt, negligentia petentis, non judicio defuncti percepti videntur. *L.* 22, § 2, *D. ad senat. Trebell.*

Although this text relates to another rule, explained in the fourth article of the second section of the *Trebellianic Portion*, yet it implies that which is explained in this article, and it is a consequence thereof which it is easy to comprehend. It may be said with respect to this article, that this executor ought to be discharged from the restitution of the

XI.

3833. *What Care the Executor ought to take of the Goods that are substituted.* — The executor who is charged with a substitution or fiduciary bequest of the inheritance is bound to take care of it; but the care which he is obliged to take is only such as that there be no room to charge him with any fault or negligence that may border upon knavery. And the diligence which he may have used in some affairs would not render him the more obnoxious, although he had failed to use the same diligence in other affairs of the like nature. Thus, for example, if he had gathered in some debts of the inheritance, that would not make him answerable for other debts.[p]

XII.

3834. *The Executor recovers the Expenses he has laid out on the Fiduciary Bequest.* — The executor who restores the inheritance to the person who is substituted to him may not only retain the fourth part of it for the Trebellianic portion, but all the expenses he has been at on account of the inheritance.[q]

XIII.

3835. *If a Father who is charged with a Fiduciary Bequest for his Children dissipates the Effects, they may be taken out of his Hands.* — If a father had been charged to restore to his son an inheritance, and had squandered away and dissipated the effects thereof, or committed other frauds, he might be obliged to restore the said effects to his son, although he were still under his father's jurisdiction, and although the fiduciary bequest were upon the condition that it should not take place till after the son were emancipated, or at some other term. And if this son should happen to be in his minority, the administration of the goods would

fruits with much more reason than the executor who is charged with a legacy. See the third article of the eighth section of *Legacies*, and the remark that is there made on it.

[p] *L.* 22, § 3, *D. ad senat. Trebell.*; — *l.* 58, § 1, *eod.*; — *l.* 108, § 12, *D. de leg.* 1. See the second article of the tenth section of *Legacies*. It is necessary to remark upon this article, and upon the second article of the tenth section of *Legacies*, the difference between an executor charged with a legacy, and him who is charged with a universal substitution of an inheritance, or of part of an inheritance, in that the engagement of this last having a larger extent, and his own interest being concerned therein, it would seem that he was not bound to take the same care as the executor who is charged only with one thing for a less time, and where the interest of another person is concerned, which he ought less to neglect than his own.

[q] *L.* 22, § 3, *D. ad senat. Trebell.* See the ninth article of the tenth section of *Legacies*.

be committed in the mean while to a curator. For as it would be neither just nor decent to oblige the father to give security for the fiduciary bequest, so on the other hand it would be equitable to prevent the loss of the goods by the only means that would be possible, that is, by taking them out of his hands. But if the father had not whereupon to subsist otherwise, a maintenance would be allotted him out of the goods which he held in trust for his son.[r]

XIV.

3836. *Punishment of the Executor who detains the Goods of the Fiduciary Bequest.* — If, after an executor who is charged with an inheritance in trust has restored it, other goods belonging to the inheritance be discovered which he has fraudulently kept back, he will be bound to restore them, together with the fruits or other revenues of the same, and likewise will be liable to costs and damages, if there be room for any such demand. But if the restitution had been made by virtue of a transaction or other agreement executed fairly and honestly, which had discharged him in such a manner from all after-reckoning as that the goods which were not restored ought to be comprehended therein, he will retain them.[s]

XV.

3837. *The Charges pass with the Goods to the Substitute.* — After the executor who is charged with a fiduciary bequest of an inheritance has made restitution of it, as all the goods and all the rights belonging to the said inheritance pass to the person for whose behoof the fiduciary bequest was made, so he ought also to bear the charges of the inheritance, and to warrant the executor who has restored the inheritance to him against all the charges thereof.[t]

XVI.

3838. *Children charged with a Fiduciary Bequest retain their Legitime, or Child's Part.* — If a father or other ascendant, having

[r] *L.* 50, *D. ad senat. Trebell.* See the twentieth and twenty-first articles.

[s] *L.* 78, § *ult. D. ad senat. Trebell.* It is necessary to remark on this article, as to what relates to damages, the difference between the executor who is guilty of delay, of which mention has been made in the ninth article, and the executor who detains the goods of the fiduciary bequest. For there is much more reason to condemn this last in damages. See the ninth article, and the remark that is there made on it.

[t] *L.* 1, § 2, *D. ad senat. Trebell.*

instituted one of his sons for his executor, had charged him with a fiduciary bequest of the whole inheritance, or a part of it, or of some goods, this disposition would not diminish the legitime or filial portion due to the said child, and he would retain it. For children cannot be deprived of their legitime, and they ought to have the same free of all charges, as has been said in its place.[u]

Remarks on the Preceding Article.

3839. Besides the legitime or filial portion which children who are charged with substitutions or fiduciary bequests may retain, it has passed into a custom that they may moreover retain the Trebellianic fourth part, of which we have already made mention, and which we shall explain in the last title. Thus, for example, an only son charged with a fiduciary bequest will have for his legitime or filial portion the third part of the goods, and for his Trebellianic portion the fourth part of the other two thirds which he is obliged to restore; which makes in all the half of the whole, and hath given occasion to the common saying, that the son hath the deduction of two fourth-parts, although this deduction does not always amount to a half, and ought to vary according as the number of children varies the quota of their legitimes or filial portions, pursuant to the rules explained in the title of the *Legitime or Filial Portion.*

3840. Most authors agree, that this usage is taken from the canon law in the 16th chapter *de Testamentis*, because that decretal affirms a sentence of a judge who had decreed this double deduction of the legitime, and also of the Trebellianic portion. And some have pretended that these two deductions may be founded on consequences drawn from some of the Roman laws, but there is not one of them on which this deduction can be founded; nay, on the contrary, the most able interpreters look upon this double deduction to be an error. But although it be an error against the Roman law, yet it is noways an error against equity, nor against the law of nature, which appropriates to children the goods of their fathers. And it is, on the contrary, a rule which, seeing it renders the condition of the children more advantageous than it was under the Roman law, although only in the cases where they are burdened with substitutions or fiduciary bequests, ought to be received as favorably in the provinces which are governed by the

[u] *Nov.* 39, *c.* 1; — *l.* 32, *C. de inoff. testam.* See the title of the *Legitime.*

written law as is, in the provinces which are governed by their customs, that custom which appropriates the greatest part of estates to the heirs of blood, and even to collateral relations of the remotest degree, to whom it gives much more than the Roman law gives to children, and so as no disposition made in consideration of death can lessen the same. And likewise this double deduction has been accounted so equitable in itself that it has been received everywhere.

3841. It is in all probability because of these considerations that some interpreters have been of opinion, that this double deduction ought to be extended to legacies as well as to fiduciary bequests, and that children overcharged with legacies ought to have in the first place their legitime or child's part, and next the Falcidian portion of the surplus, which would certainly be as equitable in this case as in the others. And there would likewise be much more reason for granting to children overcharged with legacies the deduction of the Falcidian portion, over and above their legitime or child's part, than for granting them the deduction of the Trebellianic portion in the case of substitutions, because children are not commonly charged with substitutions, unless it be in favor of their own children, or of the descendants of the person who has made the substitution, whereas legacies may be in favor of other persons than those of the family: and because the executor who is charged with fiduciary bequests has the use and profits of the goods until the time of the restitution comes; but the executor who is charged with the legacy is stripped of it from the time that the succession is open. But other authors have, on the contrary, been of opinion, that this rule of the two deductions, which they say has been established only by an error, ought not to be drawn to consequences beyond the ancient rules. And this last opinion has prevailed over the other; and therefore they have only extended in some places the double deduction of the legitime and of the Trebellianic portion in favor of ascendants who are charged with fiduciary bequests by their descendants.

XVII.

3842. *The Wife's Jointure, and also a Woman's Marriage Portion, are taken out of the Substituted Goods.* — If the legitime or child's part of a son who is charged with a substitution is not sufficient to settle a jointure on his wife proportionable to what she brought with her in marriage, and to answer the other rights and claims

which she may be entitled to by virtue of her marriage, the other goods that are substituted would be subject to the same, and so much would be taken from them as should be found necessary to make up the deficiency in the legitime or child's part for these purposes. For fathers and other ascendants, who charge their children and other descendants with substitutions or fiduciary bequests, do not mean thereby to restrain them in their conduct, and to hinder them from marrying. Thus, the goods which they leave them are first appropriated to the jointures and other rights of their wives, according as the quality of the persons may demand. And if it were a daughter charged with a fiduciary bequest, she would in like manner retain out of the substituted goods that which would be necessary for her marriage portion, suitable to her quality, if her legitime or child's part were not sufficient for it.[x]

Remarks on the Preceding Article.

3843. We might gather as a consequence from the last of the texts cited, that the double deduction of the legitime and of the Trebellianic portion, of which mention has been made in the remarks on the preceding article, is not agreeable to the Roman law: for if Justinian had thought that a son who was burdened with a fiduciary bequest was to have both his legitime or child's part, and also the Trebellianic portion, in all probability he would have expressed it; and seeing that he gave leave to deduct out of the fiduciary bequest a jointure for the wife of the heir or executor who should be charged therewith, and added, as he has done in this text, that, if the legitime or child's part were not sufficient for that purpose, the said jointure ought to be taken out of the other goods that were subject to the fiduciary bequest, he would not have failed to have added likewise the Trebellianic fourth part, and to have said, that, if the legitime and the Trebellianic portion were not sufficient, the surplus should be taken out of the rest of the substituted goods. As to which it may be remarked, that, seeing by this new right of the double deduction, the son who is charged with a substitution of the inheritance retains the half of the goods for his legitime and Trebellianic portion, it would seem that the fiduciary bequest ought not likewise to be diminished by taking from thence a jointure for the wife of the heir or executor who should be charged with the said fiduciary bequest; especially if, according to the sen-

[x] *L.* 22, § 4, *D. ad senat. Trebell.*; — *Nov.* 39, *c.* 1.

timent of some, this deduction on account of jointures and marriage portions should be extended beyond the first degree of the substitution, and if the persons who are substituted, being charged to restore the same goods to other substitutes called to the succession after them, should have the power of making the same deduction every one in their order.

XVIII.

3844. *He who is substituted to the Portion of One of Two Persons who shall die last succeeds to neither of them, if they both die together.* — If a father, instituting his children his executors, had charged such of them as should die last to restore his portion of the inheritance to another person, and it happened that all these children died at the same time, their heirs would succeed to them, and would exclude the substitute: for he was substituted only to one of them who should die the last, and only for his portion. Thus the substitution would be without effect, unless the person substituted should prove that one of the two survived the other; since, if it cannot be known which of the two died last, the condition of the substitution is not come to pass; and the substitute cannot say of any one of them that he has succeeded to him.[y]

XIX.

3845. *A Child born to a Son who is charged with a Substitution makes the Substitution to cease.* — If a testator, having instituted one of his children or descendants his heir or executor, had charged him with a fiduciary bequest or substitution of the inheritance, either in favor of other descendants of the same testator, brothers, uncles, or nephews to the said executor, or in favor of other persons; the said fiduciary bequest or substitution would not have its effect except in the case that the said executor should die without issue; and if he left any issue, the said fiduciary bequest or substitution would be null: for the intention of this testa-

[y] *L.* 34, *D. ad senat. Trebell.* See the remark on the twelfth article of the second section, *In what Manner Children succeed.* See the seventh article of the second section of the preceding article. It is to be remarked on the seventh article here quoted, and on this present article, that in this the substitution was only of the portion of one of the two brothers; so that, the substitute not being able to make appear which of the two brothers has survived the other, he will have no portion at all. But in the case of the seventh article above mentioned, the intention of the testator called the substitute to the succession of both the brothers, as has been remarked there.

tor could not have been to prefer the substitutes to these children.[z]

XX.

3846. *The Executor ought to make an Inventory, and to give Security, if it be necessary for the Preservation of the Fiduciary Bequest.* — Seeing the executor who is charged with a fiduciary bequest either of the whole inheritance, or of a part of it, cannot accept it but with this charge, he is obliged to make an inventory of the goods, in order to preserve the right of the substitute. And this inventory ought to be made either in presence of the substitute, if he can be there; or if he is not present, or even is not born, the executor ought to make it in such manner as the judge shall direct. And both in the one and the other case, besides the inventory, the executor is bound to give security, if the circumstances require it, and unless the testator has discharged him from giving any.[a]

XXI.

3847. *Even the Father and Mother are obliged to give Security in Two Cases for the Fiduciary Bequest.* — If the executor were a father, or other ascendant, charged with a fiduciary bequest in behalf of his own children, he would be excepted from the rule of giving security, unless the testator had obliged him to do it, or the said executor had contracted a second marriage.[b]

SECTION II.

OF SUBSTITUTIONS OR PARTICULAR FIDUCIARY BEQUESTS OF CERTAIN THINGS.

3848. Seeing particular fiduciary bequests of certain things are of the nature of legacies, as has been shown in the title of *Legacies*, we must apply to these fiduciary bequests the rules of that title which are applicable to them.

[z] *L.* 102, *D. de condit. et dem.*; — *v. l. jubemus*, *C. ad senat. Trebell.*; — *l.* 30, *C. de fideic.*

[a] *L.* 1, *D. ut legat. seu fid. serv. caus. cav.*; — *d. l.* § 10; — *l.* 1, *C. ut in poss. legat. vel fid s. c. m.*; — *Nov.* 1, *c.* 2, § 1; — *l.* 2, *C. ut in possess. leg. vel fid. s. c. m.* See the fourth article of the first section of the *Falcidian Portion*.

[b] *L.* 6, *C. ad senat. Trebell.*

ART. I.

3849. *One may substitute Things of all Kinds.* — One may make a substitution or fiduciary bequest of particular things of all kinds, such as a fief, a house, or other tenement, and of other sorts of goods, of a sum of money, and of every other thing which one has a mind should go from one successor to another.[a]

II.

3850. *One may charge with a Fiduciary Bequest either the Executor or a Legatee.* — The testator may charge with a fiduciary bequest of a particular thing, either his own executor, or a legatee, whether the thing be a part of the inheritance, or belong to the executor or legatee, or to some other person.[b]

III.

3851. *Different Manners of Substituting.* — These substitutions or fiduciary bequests of particular things may be made in several manners; which may be distinguished either by the differences of the expressions which the testators may make use of, or by the differences which may diversify the dispositions of this nature, independently of the ways of expressing them.[c]

IV.

3852. *All Expressions which explain the Intention of the Testator are sufficient for a Fiduciary Substitution.* — As to the expressions, in what manner soever the testator may have explained himself, his known intention ought to serve as a rule. And even the expressions which seem to leave the fiduciary bequest to the discretion of the executor or legatee who is charged with it, oblige him as much as those which ordain it in express terms. Thus, for example, if a testator had said that he is sure his executor, or a legatee, will restore to such a one such a thing, or he entreats him to restore it, these expressions would make a fiduciary bequest, which would not depend on the will of the person whom the said disposition might concern.[d]

[a] *Inst. de sing. reb. per fideic. relict.*

[b] *Inst. de sing. reb. per fid. rel.*; — § 1, *eod.*; — *l.* 50, *D. de legat.* 2.

[c] See the following articles.

[d] *L.* 11, § 19, *in f. D. de legat.* 3; — *l.* 115, *D. de leg.* 1; — *l.* 118, *eod.*; — *l.* 2, *C. comm. de legat. et fid.*; — *l.* 67, § *ult. D. de legat.* 2. See the forty-seventh article of the eighth section of *Testaments*.

V.

3853. *Divers Manners of Dispositions which have the Nature of a Fiduciary Substitution. — Example.* — As to the different manners of dispositions which have the nature of fiduciary substitutions, this diversity depends on the will of the testator;[e] who may, for example, either make a simple fiduciary bequest, charging his executor, or a legatee, to restore to such a one a land or tenement or other thing; or forbid the alienation of a fief or other estate out of his own family, or that of his executor, or of a legatee, to whom he had devised it: for this prohibition to alienate the said fief or estate would imply a substitution in favor of those of that family to which the same was appropriated.[f]

VI.

3854. *One may make a Fiduciary Substitution in Favor of Persons to be born.* — One may make a fiduciary substitution of a particular thing either in favor of certain persons, naming them, or of persons that are not as yet born, but who may be born,[g] or even indefinitely in favor of a person who shall be chosen out of a family by the executor or the legatee who is charged with the fiduciary substitution.[h]

VII.

3855. *Order of the Fiduciary Substitutes, if there be several to succeed successively.* — If the fiduciary substitution respects several persons who are called successively one after another, the substitutes will succeed in the order regulated by the testator, if he has given any directions about it, or according as they shall be called by the executor or legatee who is charged with the fiduciary substitution, if the testator has left him the liberty to regulate the order of their succeeding, which depends on the following rules.[i]

VIII.

3856. *Different Manners of regulating this Order.* — The testators may regulate differently the order of the fiduciary substitutes,

[e] See the articles which follow.

[f] See the twelfth article.

[g] See the thirteenth article of the second section of *Heirs and Executors* in general; the twenty-second and twenty-third articles of the second section of *Testaments*, and the third article of the second section of *Legacies*.

[h] *L.* 57, § 2, *D. ad senat. Trebell.*

[i] See the following articles.

according to their different intentions. Thus, a testator may name them every one in the rank which he pleases to give them. Thus, he may without naming them point them out by some description, such as the eldest males of his descendants. Thus, he may simply substitute those of his family. And what he may do with respect to his children and descendants, or those of his own family, he may likewise do the same with respect to the children either of the family of his executor, or that of a legatee, if he substitutes to him.[k]

IX.

3857. *A Fiduciary Substitution made indefinitely either to one of a certain Family, or to a certain Family.* — If the fiduciary substitution be indefinite in favor of some one person of a family whom the testator had not any other way described, as if he had charged his executor or a legatee, having children or grandchildren, to leave to one of them a house or some other tenement, this undetermined fiduciary substitution would leave it to the executor or legatee who is charged with it to make choice of the person: and he would fulfil the same by leaving the substituted goods to any one of the family[l] whom he should please to pitch on, even although he should leave it to the remotest of the family, preferring him to those who were in a nearer degree.[m] But if the fiduciary substitution were not limited to one of the family; as if the testator had substituted indefinitely those of his own family, or of the family of the executor or of the legatee, those of the said family who should happen to be in the nearest degree would exclude the most remote, and those who should happen to be in the same degree would succeed jointly, unless there should be ground to judge otherwise of the intention of the testator by circumstances which might discover the same.[n]

Remarks on the Preceding Article.

3858. We have added at the end of the article the temperament of the intention of the testator: for if, for example, a person of great quality had ordained that a land which had been erected into a title of a duchy, county, or barony, should remain in his

[k] See the texts cited on the following article.
[l] *L.* 67, *D. de legat.* 2.
[m] *D. l.* 67, § 2;—*l.* 114, § 17, *D. de legat.* 1.
[n] *L.* 32, § *ult. D. de legat.* 2;—*l.* 69, § 3, *eod.*

family, it would be presumed that his intention was to appropriate the same to the eldest heirs male, and not to leave a handle for lawsuits and wrangling by the division of an estate of this kind. As to which it may be observed, that it is very difficult for a case of such a substitution to fall out so indefinite as not to distinguish either the degrees, or the eldest of each degree, or the males from the females; for those who make substitutions do not usually fail to make these distinctions. But if a testator had failed to do it, the rule explained in this article would point out the order of the substitutes, and would distinguish those who are called either jointly together, or by preference; and even in cases where the testators have explained themselves the most clearly, there may fall out events in which the use of this rule may be necessary.

X.

3859. *If the Executor who was to choose the Fiduciary Substitute out of several did not make the Choice, they will all of them have a Share in the substituted Goods.* — If, in the case of the preceding article, the executor or the legatee who was to choose the substitute should happen to die without having named him, the substituted goods would belong in common to all those among whom the choice was to be made. For seeing no one of them would have more right than the other, and that there would remain nobody to distinguish them, the testator, who was the only person who could give direction therein, not having done it, but having considered them all alike, they would be all of them called together; and if there remained only one of them, he would have the whole.[o]

XI.

3860. *The Fiduciary Substitute who is chosen by the Executor derives his Right only from the Testator.* — The fiduciary substitute who has been named by the executor who had the power of choosing him from among others, derives his right only from the testator, and not from the person who has chosen him, although it was in his power not to have named him. Which hath this effect, that if, for example, this executor, having declared this choice by his testament, had therein bequeathed to the person whom he then named for the substitute the thing which was subject to the fidu-

[o] *L.* 67, § 7, *D. de legat.* 2.

ciary substitution, it would not be in effect a legacy: for he would not thereby give any thing that was his own, since he would only leave what he was obliged to restore, having only the liberty of choosing the person to whom he was to restore it. Thus, he could much less impose on this fiduciary substitute any condition, or any charge.[p]

XII.

3861. *The Prohibition to alienate does not oblige, unless it be made in Favor of some Person.* — What has been said in the fifth article, that the prohibition to alienate may imply a fiduciary substitution, ought to be understood of a prohibition that has some cause, and which is in favor either of a family, or of a person, to whom the testator intended that the thing of which he had prohibited the alienation should go. For a bare prohibition to an executor, or to a legatee, to alienate certain lands or tenements, without having some regard to the children of the said executor or the said legatee, or to other persons, would have no manner of effect, and would be no obstacle why the said executor or legatee might not justly alienate lands that would be his in such a manner as that no other person would have any right, or expectation, or interest whatsoever in them by the will of the testator.[q]

XIII.

3862. *The Prohibition to alienate certain Lands, and to dispose of them out of the Family, does not take away the Choice of one of the Family.* — If a testator, naming for his executor his son who had children, had forbidden him to alienate certain lands, requiring him to leave them in his family, this executor could not give away the said lands to others than his children; but he might leave them to any one of his children whom he should please to name. For by leaving them to one, it would still be in the family that he had left them. And although the persons substituted should be the descendants of this testator, and he had an equal affection for them all, yet his expression would mark that he left it to his son to choose any one of his own children, and that what he had in view was only to appropriate the said lands to his family, to prevent their going to any other family, whether it were

[p] *L.* 67, *D. de legat.* 2; — *d. l.* § 1, *in f.*; — *l.* 7, § 1, *D. de reb. dub.*
[q] *L.* 114, § 14, *D. de legat.* 1.

by an alienation or other disposition of the executor who is charged with the substitution.[r]

XIV.

3863. *The Fiduciary Substitute ought to have either the Thing subject to the Substitution, or its Value.* — If an executor or a legatee were charged with a fiduciary bequest, which could not be otherwise performed than by giving to the substitute the value of that which the testator intended should be given him, this value would be due to him from the said executor or legatee. Thus, for example, if he were charged to buy a certain house, or certain lands, for the fiduciary substitute, and the proprietor of the said house or lands would not sell them, he would owe the price of them. Thus, for another example, if he were charged to instruct a young man in a trade, of which some accident had rendered him incapable, as if he was fallen lame, or become blind, this fiduciary bequest would be estimated in money.[s]

XV.

3864. *The Fruits and Interest of the substituted Goods are due from the Time of the Delay.* — The executor or legatee who is charged with a fiduciary substitution of a particular thing owes the fruits and interest thereof from the time that he delays to acquit it after it is due, in the same manner as the executor who is charged with a fiduciary substitution of the inheritance, pursuant to the rule explained in the ninth article of the first section; and he is also liable to damages pursuant to the same rule, if there should be room for such a demand.[t]

XVI.

3865. *The Executor cannot revoke the Payment of the Fiduciary Bequest, which proves Null if he has once acquitted it.* — If there were some nullity in the formalities of the testament, or some other defect which would annul the fiduciary bequest, and the executor who was charged with it had acquitted it; he could not oblige the fiduciary substitute to restore back to him that which he

[r] *L.* 114, § 15, *D. de legat.* 1; — *d. l.* 114, § 17. See the ninth article, and the remarks made on it.

[s] *L.* 11, § 17, *D. de legat.* 3; — *l.* 14, § 2, *eod.*

[t] *L.* 26, *D. de legat.* 3. See the third article of the eighth section of *Legacies*, and the remarks there made upon it; as also the ninth article of the first section of this title.

had willingly paid; and the pretext that the fiduciary bequest was not due would be useless. For he would by that payment only have fulfilled more faithfully the intention of his benefactor.[u]

XVII.

3866. *The Legatee charged with a Fiduciary Bequest which proves to be Null reaps the Benefit of it, and not the Executor.* — If, a legatee being charged with a fiduciary bequest out of his legacy, it should happen that the thing substituted could not be restored, as if the substitute were become incapable of it, or by reason of some other event; the executor could not pretend that this fiduciary bequest which proves useless ought to return to him, but the legatee would reap the benefit of it. For it was a charge upon his legacy, which ceases in his favor.[x]

SECTION III.

OF SOME RULES COMMON TO FIDUCIARY SUBSTITUTIONS OF AN INHERITANCE, AND TO THOSE OF PARTICULAR THINGS, AND TO TACIT FIDUCIARY SUBSTITUTIONS.

3867. We must not confine the rules that are common to these two sorts of fiduciary substitutions to the rules which shall be explained in this section; for it is easy to judge that the rules for the interpretation of testaments, and many others that have been explained in several places, may be applied to them. But we have put down in this section some rules that are not so general, and which agree more particularly to these two sorts of fiduciary substitutions.

ART. I.

3868. *One may substitute either one Person alone, or many.* — All substitutions or fiduciary bequests, whether they be universal, of the whole inheritance, or particular, of certain things, may be made either in favor of one person alone, or of many, whom the testator calls to the succession, that they may divide it among them, whether it be in equal or unequal shares.[a]

[u] *L.* 2, *C. de fideic.*

[x] *L.* 38, § 6, *D. de legat.* 3.

[a] § 1, *Inst. de vulg subst.* · Although this text relates chiefly to the vulgar substitution, yet it may be applied to the fiduciary substitution, and the testator has the same liberty in this as in the other.

II.

3869. *One may substitute in one or more Degrees.* — Whether there be only one substitute or many, the substitution may either end with the first degree, or be extended to several degrees from one substitute to another successively. And the substitution becomes open to every degree, when, the person who filled the preceding degree happening to fail, another succeeds in his place.[b]

III.

3870. *One may substitute the same Persons who may be instituted Executors.* — All persons who are capable of succeeding are also capable of being substituted. Thus, one may substitute as well as institute children not yet born; persons unknown to the testator, but whom he sufficiently describes in order to distinguish them; and in general one may substitute all persons who, at the time that the substitution becomes open, may be in a condition to reap the benefit of it, and in whom there is no manner of incapacity.[c]

IV.

3871. *Persons incapable of Fiduciary Substitutions.* — We must reckon in the number of persons incapable of fiduciary substitutions, all those to whom the laws prohibit the giving of any thing by a testament: which takes in not only strangers who are called aliens, and those who are civilly dead, whether it be by a sentence of condemnation which ought to have this effect, or by a profession of some religious order, but also all other persons to whom some law or some custom forbids us to give any thing.[d]

V.

3872. *Tacit Fiduciary Substitutions are forbidden.* — Seeing those who intend to make dispositions that are prohibited make use of other persons' names, to whom they give that they may re-

[b] *Inst. de vulg. subst.* The same remark is to be made on this text that has been made on the preceding article. See, concerning the degrees of substitutions, the preamble of the first section.

[c] See the first article, and the thirteenth article of the second section of *Heirs and Executors* in general; the first, seventeenth, twenty-second, twenty-third, twenty-fourth, and twenty-fifth articles of the second section of *Testaments;* and the third article of the second section of *Legacies.*

[d] See the second section of *Heirs and Executors* in general, and the preamble to the same section.

store it to those to whom they cannot give, we give the name of tacit fiduciary substitutions to these secret dispositions which in outward appearance regard the persons whose names are made use of, and which in reality and in secret are intended for those to whom the law forbids to give. And these sorts of fiduciary bequests or substitutions are unlawful, as much as a disposition would be in which the persons to whom it is not lawful to give had been expressly named.[e]

VI.

3873. *The Crime of those Persons who lend their Names to Tacit Fiduciary Substitutions.* — The persons who lend their names to these tacit fiduciary substitutions or bequests, whether they engage themselves by writing, or by word of mouth, or in whatever manner it be that they receive any thing with design to restore it to the persons to whom the testator could not give, are considered in the eye of the law as if they had stolen that which they may receive by virtue of such a disposition. And they are so far from being under an obligation thereby to restore what they have received to the persons whom the testators had in their view, that they contract no other engagement than to restore to the executors that which they may have received on that account, together with the fruits and interest thereof that were fallen due even before the demand.[f]

VII.

3874. *How Tacit Fiduciary Substitutions are proved.* — The tacit fiduciary substitutions and bequests may be proved, not only by writings, if there are any, but likewise by the other sorts of proofs, according to the rules which have been explained in the title relating to this matter.[g]

Remarks on the Preceding Article.

3875. It is necessary to observe on this article and on the text that is here cited, that there is a difference between our usage and the Roman law as to tacit fiduciary bequests or substitutions; which consists in this, that by the Roman law the exchequer

[e] See the texts cited on the following article.

[f] *L.* 46, *D. de hæred. petit.*; — *l.* 18, *D. de his quæ ut ind.*; — *l.* 103, *D. de legat.* 1; — *l.* 10, *D. de his quæ ut indig.*

[g] *L.* 3, § 5, *D. de jur. fisci.*

reaped the benefit of a tacit fiduciary bequest which was made in favor of a person to whom it was not lawful to give, and that by our usage it is the heir or executor who has the advantage thereof. Thus they were more reserved under the Roman law than we are in France, as to the proofs of tacit fiduciary bequests, and in order to avoid the favoring of the cause of the exchequer too much, they required a strict proof of the fraud, as appears from the text cited on the article; and we see in another text, that presumptions, which might serve as proofs in our usage, were not sufficient. It was in the case of a testament of a husband who had instituted for his universal heir or executor his wife's father. The question was, whether it was not a fraud against the laws which were then in force, and which did not suffer in certain cases the husband to make his wife his universal heiress or executrix:[a] and it is decided in that law, that the bare consideration of the paternal affection which united this testator's father-in-law to his wife, to whom he could not leave all his estate, was not a sufficient presumption that it was a tacit fiduciary bequest, made with a view that the estate should be restored to the testator's widow. *Si gener socerum hæredem reliquerit, taciti fideicommissi suspicionem sola ratio paternæ affectionis non admittit.*[b] If the like question should happen in the provinces which are governed by their peculiar customs, where the husband cannot give any thing to the wife, nor the wife to the husband, they would reject this presumption, as it might be rejected when the interest only of the exchequer was concerned; and, on the contrary, they would have great regard to the said presumption, not only in consideration of the understanding which might be presumed to be between the father and the daughter, but likewise for this other reason, which some customs have established by an express law, that persons who are not allowed to give to one another by their testaments, such as the husband to the wife, the wife to the husband, are as much tied up from giving to other persons to whom the husband and wife may succeed. Thus the prohibition of dispositions made by minors in their testaments in favor of their tutor or guardian, is extended to his children; and this is expressly regulated so by some customs.

VIII.

3876. *One cannot restore the Goods that are substituted before the Time of the Substitution comes, if the too precipitate Restitution turns*

[a] *Ulp. tit.* 15 *et* 16.

[b] *L.* 25, *D. de his quæ ut ind.*

to the Prejudice of the Substitute. — The executor or legatee who is charged with a fiduciary substitution is not tied up to wait for the time in which the substitution is to take place, and he may restore beforehand to the substitute the goods which are subject to the fiduciary substitution, provided that it be without prejudice to the interest of other persons, as has been explained in another place,[h] and provided also that this precipitate restitution do not turn to the damage of the fiduciary substitute, contrary to the intention of the testator. For if, for example, a testator had charged his executor or a legatee with a fiduciary bequest of a yearly pension, to be paid to some poor person for his maintenance, or of a sum of money payable after a certain time, to be laid out to some use for the benefit of the person for whom the said fiduciary bequest was intended, such as the bringing him up to some trade, or the giving of a marriage portion to a poor young woman; he who should be charged with these fiduciary bequests could not in the first case advance in one payment all the several yearly sums which were destined for alimony, unless some circumstances should render this advancing of the payment more profitable to the person for whom the said alimony was bequeathed: and in the second case, if the person for whose benefit the fiduciary bequest was made were not as yet of age sufficient to learn a trade, or the said young woman ripe for marriage, the advanced payment, without the precaution of taking security that the money should be applied to the purposes for which it was designed, would not acquit the executor who had paid it. But if the term for the payment of the legacy in trust were only in favor of the executor, and no other persons had any interest therein, he might without difficulty pay the same before the term.[i]

IX.

3877. *A Donation has the Effect of an Election of a Substitute, whom the Donor was empowered to choose.* — If he who was charged with a fiduciary bequest or substitution at the time of his death, in favor of some one of his children whom he should think fit to choose, had given in his lifetime to one of his children the things which were subject to this fiduciary bequest, this donation would be in the place of an election, if the same were not revoked. For although the liberty of this choice ought to last until the

[h] See the seventeenth and eighteenth articles of the tenth section of *Legacies.*
[i] *L.* 15, *D. de ann. leg.*

death of the person charged with this fiduciary substitution, and it would be for the interest of all the children that the said donation should not destroy the said liberty; yet it would be sufficient that the donee had been made choice of, and that the said choice had not been revoked; seeing the said choice would be confirmed by the will of him who, having it in his power to make another choice, had not done it. So that it would be the same thing as if this choice had been made at the time of his death.[k]

X.

3878. *The Bounds of the Liberty to give to one of the Substitutes more than to the others.* — If a testator, having instituted his son his heir or executor, had charged him to restore to his children his inheritance, praying him at the same time to give to one of them whom he should name to him something more than would fall to the share of the others, the said executor would not have an indefinite liberty to give to this son the greatest part of the inheritance, but only a power to regulate and settle some small advantage for him, that would not make too great an inequality between him and the others.[l]

XI.

3879. *Order of the Substitutes in divers Degrees.* — If a father who had several children, having instituted his wife his executrix, had entreated her to restore his inheritance to their children, or to such of them as should happen to be alive, or to restore it to their grandchildren, or to any one of them whom she should choose, or to some one of his family whom she should name; a disposition conceived in these terms would not leave to the said executrix an indefinite liberty to choose whomsoever she should think fit from among these three sorts of substitutes. But this expression would call in the first place all the children of the first degree, and they would all of them be preferred to all the grandchildren of the testator; and in default of the children, she might choose among the grandchildren, but could not prefer to them the collateral relations, whom she could not call to the succession but in default of the children and grandchildren.[m]

[k] *L.* 77, § 10, *D. de leg.* 2.

[l] *L.* 76. § 5, *D. de legat.* 2.

[m] *L.* 57. § 2, *D. ad senat. Trebell.* What is said here of the choice from among the grandchildren must be understood without prejudice to their legitime or child's part.

XII.

3880. *The Parties who are mutually substituted to one another may renounce the mutual Substitution.* — If two brothers, who are substituted reciprocally to one another in case one of them should die without issue, had agreed between themselves that the substitution or fiduciary bequest should have no effect, this agreement would annul the substitution: for they might discharge one another from it, that each of them might possess freely that which his father had left him, and that neither of them might have any temptation to wish for the other's death. Which consideration renders such an agreement so favorable, that minority alone would not be sufficient to set it aside, unless it should appear by the circumstances that one of the parties had sustained damage by the agreement.[n]

XIII.

3881. *The Prescription of substituted Goods runs both against the Executor and likewise against the Substitute.* — If a third person, who had honestly and fairly possessed some goods which were subject to a fiduciary bequest or substitution for so long a time as to acquire a right by prescription, computing therein the time which had run against the executor who was charged with the fiduciary substitution, the substitute could not deduct that time upon pretence that the prescription could not run against the executor to his prejudice. For the executor was the master of the goods, and it was his business to enter a claim, in order to interrupt the prescription: and the substitute might likewise on his part have watched for his own interest. And it would be the same thing if it were some right belonging to the inheritance, which, for want of a demand on the part of the executor, had been lost by prescription.[o]

XIV.

3882. *The Prescription of Lands substituted, which are alienated by the Usufructuary, divests the Substitute of the Property*

[n] *L.* 11, *C. de transact.*; — *l.* 16, *C. de pact.*

[o] *L.* 70, § *ult. D. ad senat. Trebell.* See the eleventh article of the first section. See the following article. We must understand this and the following article, of fiduciary bequests or substitutions which had not been published or enrolled, pursuant to the ordinances which have been taken notice of at the end of the preamble of this title. For if a substitution of a land, for instance, had been enrolled, the right of the substitutes would be preserved against all purchasers and other occupiers.

thereof. — If a legatee of a usufruct of lands which are subject to a fiduciary substitution had disposed of the property of the said lands, by his testament, in favor of a person who, being ignorant of the fiduciary substitution, had possessed the said lands during the time required for prescription; this possessor could not any more be molested in his possession by the substitute.[p]

XV.

3883. *The Fiduciary Substitution after the Death of the Executor or Legatee is not open by their Civil Death.* — If it should happen that the executor or legatee, who is charged with a fiduciary substitution that ought to take place at his death, should fall into a state of civil death, whether it were by a sentence of death, or by a condemnation to some other punishment, which would be attended with the confiscation of his goods; this civil death and this confiscation would not lay open the fiduciary substitution. For besides that the substitution would be understood only of a natural death, and that the substitute might die before the executor or legatee, it might so happen that the sentence of condemnation might be annulled by an act of grace of the prince, and that so this executor or legatee, being restored to his former state and condition, would enter again to the possession of his goods, or might acquire others. Thus, this fiduciary substitute could not demand the goods that are substituted: but it would be just, in such a case, that provision should be made for the security of the substituted goods, by precautions to be taken between the fiduciary substitute and those to whom the substituted goods should go.[q]

XVI.

3884. *The Substitution to an Executor or Legatee, in case he should die without Issue, remains without any Effect if he leaves Children behind him.* — If an executor or legatee were charged with a fiduciary bequest or substitution, in case he should happen to die without issue, and he had children who survived him, this fiduciary substitution would remain without any effect. And even although these children should renounce the succession of

[p] *L.* 36, *D. de usu et usuf. et red. legat.* We must make the same remark on this article which has been made on the preceding.

[q] *L.* 48, § 1, *D. de jure fisci.* As to the precautions mentioned in the article, see the third article of the second section of the *Falcidian Portion.*

their father, yet the substitute would have no right, because the condition of the fiduciary substitution would not be accomplished, and because the intention of this testator was not to engage the said children to become heirs to their father, but to leave to him the free use and disposal of the substituted goods, in case he had children.[r]

Remarks on the Preceding Article.

3885. It is not so much for the case explained in this article that we have added this last rule to this title, as for the consequences which may be gathered from it for resolving a question which is commonly proposed, and which is expressed in these terms, to wit, *If the children who are in the condition are in the disposition;* that is to say, if the children, who, surviving their father, make the right of the substitute to cease, are themselves substituted.

3886. This question has divided the interpreters, the greatest part of whom have been of opinion, that the children are substituted. Others, and among them the most able interpreter of them all, are of a contrary opinion; and to support it they quote the text cited on this article, and some others, but without explaining the consequences which they gather from them: and seeing none of those texts precisely decide this question, and that it is so frequently started that we cannot well dispense with examining it, it would seem that it might be urged against the opinion of those who will have the children to be substituted, that the text cited on this article, and all the others which decide that the fiduciary substitution, *in case there be no issue*, ceases when there is issue, seem to imply the consequence that there is no substitution with respect to the children. This consequence is not only founded on this reason which is expressed in the texts, that the condition of the fiduciary substitution is not come to pass; for to this one might reply, that this reason respects only the substitute; but it is also founded on this, that we see that in all the laws which mention this case, and which decide it after the same manner, there is not any one of them in which it has been thought fit to add any words to this effect, that truly the fiduciary substitution was null in respect of the substitute, but that it would go to the children, as being comprehended in the disposition of the testator, and called by him

[r] *L.* 114, § 13, *D. de leg.* 1; — *l.* 1, *C. de cond. ins.*; — *v. l.* 6, § 2, *C. ad senat. Trebell.*; — *l.* 85, *D. de hæred. inst.*

to the substituted goods. This addition seems to be so natural and so necessary, that seeing none of the authors of these laws have thought of it, we may conclude from thence that they did not think that the substitution took in the children. And among these texts there is not one of them where this addition would have been more natural and more necessary than in the text cited on this article, and which we have made choice of for that reason: for the circumstance of the children's renouncing their father's succession made it still more necessary to have added, that although they were not heirs to their father, yet they would nevertheless reap the benefit of the fiduciary substitution.

3887. We may add to these reasons, although they seem to be decisive enough in themselves, that, if we examine into the intention of the testator who substitutes to his executor, or to a legatee, *in case he has no children*, it does not seem as if he had any the least view of calling the children to the substitution: for if that had been his intention, he would have substituted the children in the first place, and not called another substitute except in default of them. Thus, when the testator does no other thing but barely dispose in favor of a fiduciary substitute in case he have no children, his intention appears to be, that, in case there be children, their father shall not be any longer charged with the fiduciary substitution, but shall have free liberty to dispose of the goods in favor of such of his children as he shall think fit to choose, or of other persons.

3888. We think that we may venture to say in relation to this question, that the interpreters who have invented it have made a doubt of that which the simplicity of the principles sets in a clear and evident light, and that their sentiment is contrary to the rules: and the author whom we just now quoted was of this opinion as to this matter.* The reader may have remarked in some places of this book such like opinions of the interpreters, opposite to the spirit of the laws. And we make this reflection here, that we may have an opportunity of observing further, that we see in this question, and in the sentiment of those interpreters, a remarkable example of the difficulties which they have started in the matter of substitutions, framing in this manner questions, and decid-

* Deficientibus superioribus conjecturis, negarem et pernegarem eos qui sunt in conditione esse in dispositione, ex l. Gallus, &c. *Cujac. consult.* 35. These conjectures, taken from the words of the testament about which this author was consulted, make no alteration in his opinion touching the general position.

ing them by other principles than those of the laws, and taking afterwards their own decisions for new principles, from which they raise and resolve in the same manner other questions. Thus it is that they have perplexed this matter of substitutions, which, although in itself sufficiently intricate, may nevertheless be reduced to principles and rules that are plain enough, and which are sufficient for resolving all the questions that can arise, or that can be imagined. It is to these principles and to these rules that we have confined ourselves in this book, as well as the others, having endeavoured to comprehend therein every thing that is in the laws which is conformable both to our usage and to equity, without leaving out even the particular cases which are specified in the laws, and which may make the use of the rules easier.

TITLE IV.

OF THE TREBELLIANIC PORTION.

3889. By the Trebellianic portion is meant the fourth part which the laws appropriate to executors who are charged with a universal fiduciary bequest of the whole inheritance, or of a part of it, which distinguishes the Trebellianic portion from the Falcidian portion. For the Falcidian portion relates to legacies and to particular fiduciary bequests of certain things.

3890. This fourth part was called the Trebellianic portion because of a decree of the senate, which was named thus from the name of one of the consuls of that year in which it was made, ordaining that the executor who should be charged to restore the inheritance to the fiduciary substitute should be discharged of all the debts and burdens, and that the same should pass with the goods to the substitute. But seeing the executors, who had but little or no profit from the inheritance which they were obliged to restore, refused to accept it when they were only to make restitution of it, it was ordained by another decree of the senate that the executor who should be charged with a fiduciary bequest of the inheritance might retain the fourth part thereof. But because of some inconveniences in this last decree of the senate, which it would be to no purpose to mention here, Justinian

confounded the two decrees of the senate together, giving to the first the effects of them both, in such parts of them as he intended should subsist both of the one and the other. So that the name of Trebellianic portion has ever since been applied to this fourth part that is taken out of the fiduciary substitutions of inheritances. But this Trebellianic fourth part being founded on the same equity, and being of the same nature, with the Falcidian portion, or rather being only a sort of Falcidian portion, in that it retrenches the dispositions of a testator who should charge his executor to restore more than three fourths of the inheritance; this affinity between these two fourths has been the reason why the laws have confounded them together, and that they have even given to the Trebellianic portion the name of the Falcidian.[a] And seeing for this reason the rules of the Falcidian portion do almost all of them agree to the Trebellianic portion, it is necessary that we should join them to those which shall be explained in this title, in which we shall confine ourselves to such rules as are necessarily to be distinguished from those of the Falcidian portion. And as to the rules of the Falcidian portion, which have no relation to the Trebellianic portion, they come within so narrow a compass, and are so easily distinguished, that it would be altogether useless to make any remark on them here, seeing they may be easily discerned by the bare reading of them.

3891. We shall say nothing here of the double fourth part which belongs to children who are charged with fiduciary substitutions, to avoid repeating what has been said of this matter in the sixteenth article of the first section of *Direct and Fiduciary Substitutions*. The reader ought not to be surprised that he finds in this title only a few articles; for it was necessary that we should confine ourselves to the rules of which it is composed. And all the rules which may be thought to be wanting here, and which swell in the body of the Roman law the title relating to this subject, have been explained either under the title of the *Falcidian Portion*, as we have just now remarked, or in the other titles of this fifth book, where we have set down every rule in its proper place.

[a] *V. l.* 6, *C. ad senat. Trebel.*; — *l.* 1, § 19, *eod.*

SECTION I.

OF THE USE OF THE TREBELLIANIC PORTION, AND WHEREIN IT CONSISTS.

ART. I.

3892. *Definition of the Trebellianic Portion.* — The Trebellianic portion is the fourth part of the inheritance, which ought to remain to the executor who is charged to restore it.[a]

II.

3893. *It takes Place for an Executor who has but a Part of the Inheritance.* — If he who is charged with a fiduciary substitution be heir or executor for a part only of the inheritance which he is charged to restore, he will have the Trebellianic portion out of it, which will be the fourth part of his portion of the inheritance. And it would be the same thing if several heirs or executors were charged to restore their shares of the inheritance, or only some of them theirs: for every one of them would have the Trebellianic portion of his own share.[b]

III.

3894. *The Testator may, in Lieu of the Trebellianic Fourth Part, assign to the Executor either Houses, Lands, or some other Thing.* — Although the fourth part which ought to remain to the executor be a quota of the inheritance, which makes it necessary that there should be a partition of the estate made between the executor and the fiduciary substitute; yet the testator may assign to the executor a certain land or tenement, or other thing, or even a sum of money in lieu of the said fourth part; and in this case, if the executor restore the whole inheritance to the fiduciary substitute, excepting what is thus reserved to him by the testator, the substitute would be solely answerable for all the charges; whereas if the executor should take the fourth part of the inheritance, the goods and the charges of the inheritance would be divided between them proportionably to their shares.[c]

[a] § 5, *Inst. de fideic. hæred.*

[b] § 2, *in f. eod.*; — § 8, *in f. eod.*

[c] § 9, *Inst. de fideic. hæred.*; — *l.* 30, § 3, *D. ad senat. Treb.*; — *l.* 2, *C. eod.*; — *l.* 47, § 1, *D. ad leg. Falc.*

SECTION II.

OF THE CAUSES WHICH MAKE THE TREBELLIANIC PORTION TO CEASE, OR WHICH DIMINISH IT.

ART. I.

3895. *The Testator may forbid the Deduction of the Trebellianic Portion.* — If the testator has expressly forbidden the deduction of the Trebellianic portion, the executor is at liberty either to accept or refuse the inheritance; but if he does accept it, he will be obliged to fulfil the fiduciary substitution without retaining any thing.[a]

II.

3896. *The Executor who restores voluntarily the whole Inheritance, without retaining any Thing, cannot afterwards demand the Trebellianic Portion.* — If the executor who might have retained the Trebellianic portion had restored the whole inheritance, without any deduction, he would not afterwards be admitted to demand it: for it would be presumed that he had made restitution of the whole inheritance only that he might fulfil more punctually the fiduciary substitution; unless it should appear by the circumstances that some error in fact, or some other cause, ought to destroy this presumption.[b]

III.

3897. *The Fiduciary Substitute, who is charged with a Secona Restitution, has no Right to the Trebellianic Portion.* — If the fiduciary substitute of the inheritance, or of a part of it, were likewise charged to restore it to another person, he could not deduct a second Trebellianic portion out of it, although the executor who had restored the inheritance to him had retained his fourth part: for the Trebellianic portion is due only to the executor who succeeds immediately to the testator, unless the testator has likewise granted it to this fiduciary substitute.[c]

[a] *L.* 1, § 19, *D. ad senat. Trebell.*; — *Nov.* 1, *c.* 2, § *ult.*; — *d.* § *in f.* See the last article, and the remark that is there made on it.

[b] *L.* 68, § 1, *D. ad senat. Trebell.* See the fifteenth and sixteenth articles of the fourth section of the *Falcidian Portion.*

[c] *L.* 47, § 1, *D. ad leg. Falc.*; — *l.* 1, § 19, *D. ad senat. Trebell.*; — *l.* 55, § 2, *eod.*

IV.

3898. *How the Fruits are reckoned or not reckoned as Part of the Trebellianic Portion.* — If the goods subject to the fiduciary substitution were to be restored only some time after the death of the testator, or after the existence of a condition on which the substitution should depend, the fruits which the executor had reaped before the substitution was open would be reckoned to him as part of his Trebellianic portion.[d] But the fruits reaped by the executor after the time that the fiduciary substitution was to take place, when the restitution of the substituted goods was delayed only through the negligence of the substitute, would not be reckoned as part of the Trebellianic portion due to the said executor.[e]

V.

3899. *The Fruits are not reckoned to the Children as Part of their Trebellianic Portion.* — The rule explained in the preceding article, which reckons to the executor the fruits as part of his Trebellianic portion, relates only to such executors as are not children or descendants of the testator. For the fruits which the children enjoy before the fiduciary substitution is open with which they are charged by their father, mother, or other ascendant, accrue to them without any diminution of the claims or demands which they may have upon the inheritance which they are charged to restore; whether it be that the fiduciary substitution be in favor of their own children, or other descendants of the testator. And they will have, over and above the fruits which they may have enjoyed, their entire fourth part of the whole inheritance, even although the testator had ordained that those fruits should be reckoned as part of it.[f]

VI.

3900. *Penalty of the Executor who is charged to restore the Inheritance, and who has not made an Inventory of the Effects.* — Seeing the Trebellianic portion is a fourth part of the inheritance, the executor who pretends to retain this fourth part ought to show

[d] *L.* 18, § 1, *D. ad senat. Trebell.*; — *l.* 52, § 5, *eod.*

[e] *L.* 22, § 2, *eod.* See the sixteenth article of the fourth section of the *Falcidian Portion*, the ninth article of the first section of *Substitutions*, and the fifteenth article of the second section of the same title.

[f] *L.* 6, *C. ad senat. Trebell.*

what the goods of the inheritance consist in, in order to regulate that which he may retain, and that which he ought to restore. And this is what he cannot do but by making an inventory of all the goods of the inheritance: which lays a double tie on this executor to make the said inventory, both for his own interest, that he may establish his right to the Trebellianic portion, and regulate the proportion of it, and for the interest of the fiduciary substitute, that he may be able to judge of the fidelity of the restitution of the substituted goods, as has been mentioned in the twentieth article of the first section of *Substitutions*. Thus, the executor who, being charged with a fiduciary substitution of the inheritance, or of a part of it, had neglected to make an inventory of the goods, would be very justly deprived of the Trebellianic portion, unless it were in a case which should not require this precaution, or that particular circumstances should exempt him from this penalty, which would be justly inflicted on him in case his not having made an inventory could be anywise imputed to his want of fidelity, or to his neglect.[5]

Remarks on the Preceding Article.

3901. It is to be remarked on this article, and on the twentieth article of the first section of *Substitutions*, that several interpreters have been of opinion, that, although the executor who is charged with a fiduciary substitution of the inheritance has neglected to make an inventory of the goods, he is not for that omission to be deprived of the Trebellianic portion. And the chief foundation on which they build their opinion is, that, the privation of the Trebellianic portion being a punishment, it ought not to be inflicted on the executor unless there be an express law that has established it: that it is true, that the laws have ordained that the executor shall forfeit his right to the Falcidian portion of legacies when he has neglected to make an inventory; but that this punishment ought not to be extended to the executor who is charged with a fiduciary substitution of the inheritance, or of a part of it, because penal laws are not to be extended beyond the cases for which they were designed. The other interpreters, on the contrary, ground their opinion on the necessity of an inventory, in order to justify the fidelity of the executor in making the restitution; and they

[5] See the texts cited on the twentieth article of the first section of *Direct and Fiduciary Substitutions*.

add, that whatever the laws have regulated in the matter of the Falcidian portion is common to the Trebellianic portion, because of the confusion which the laws have made of these two fourths into one, as has been observed in the preamble of this title, and that the same reasons make it necessary to have an inventory in the one case as well as the other; and that likewise Justinian in his first novel, chap. 2, where he ordains that the Falcidian portion shall be forfeited in case there be no inventory, obliges the executor to satisfy, not only the entire legacies, but also the fiduciary bequests: *Non retinebit Falcidiam, sed complebit legatarios et fideicommissarios;* which words those of the other party restrain to fiduciary bequests of particular things, and that with very good reason.

3902. This question has been variously decided in divers tribunals of Europe, and there have been likewise contrary judgments given thereupon in several parliaments of this kingdom, in which they have always had a due regard to the particular circumstances of each case. For it is certain that there are cases in which it would not be just to deprive the executor of the Trebellianic portion for want of an inventory; as, for example, if an executor were charged to restore the inheritance at the same instant that he should accept it; because in this case, which was very frequent under the Roman law, there would be no inventory to make, the fiduciary substitute having nothing to do but to take the declaration of the executor who restores the inheritance to him, and so to take possession of the goods. And the like case might happen if a testator who had a mind to convey his inheritance, or a part of it, to a relation or friend who was absent in a foreign country, had instituted another person his executor, and had charged him to restore the inheritance which he left to him in trust to his absent friend as soon as he should return, and the said absent person chanced to return about the time of the testator's death; for the executor in this case, being willing to restore the substituted inheritance at the same time that he accepted it, would have no occasion to make an inventory in order to preserve his Trebellianic portion. There are also other cases in which it would not be just to deprive the executor of the Trebellianic portion for his not having made an inventory; as, for example, if the executor were a minor, and his guardian had omitted to make the said inventory, or if the death of the testator had happened in the time of a plague. And if in these and other the like cases the fiduciary sub-

stitute should pretend that the restitution were not entire, he would be allowed to bring proofs of the goods, and of their value. We were in doubt whether we should except also the case where the executor should happen to be a son of the testator's, and was charged with a fiduciary substitution in favor of his own children: if, for example, the substitution were only for the benefit of one of the children, and the circumstances should give ground to presume, that some favor had been shown to the other children in prejudice of the substitution. What gives occasion to the doubt is, that on the one part the father might prejudice the interest of the child who was to have the benefit of the substitution, and might diminish the restitution in favor of the other children; and that on the other part the said father of the substitute being to retain out of all the goods of the testator both his legitime and also the Trebellianic portion, according to the remark made on the sixteenth article of the first section of *Substitutions*, the same is considered as a part of his legitime. So that it might be a hardship to deprive him of it for want of an inventory. But if the executor were a stranger, or even a collateral relation, and charged with a fiduciary substitution, it would seem to be just that for the want of an inventory he should forfeit the Trebellianic portion, as he would forfeit the Falcidian portion on the same account, there being the same reasons for both. And although we should suppose that Justinian in this novel had only the Falcidian portion in his view, yet it does not seem to be necessary that we should have an express law to oblige the executor who is charged with a fiduciary substitution to make an inventory of the goods, in order to prove his fidelity in making restitution of them. This duty is enjoined by the law of nature, and by consequence it is natural also that the want of an inventory should be punished by some penalty, which ought to be at least the privation of a benefit which, consisting in a quota of the inheritance, could not be given to the executor unless he should make appear what the inheritance consisted in; seeing otherwise it would be an encouragement to fraudulent concealments of the effects.

3903. It is upon these different considerations that we have thought proper to compose this article in the manner in which it is conceived, in order to reconcile the letter of the rules of law with equity, which ought to be the life and spirit of them.

APPENDIX.

EXPLANATION

OF THE MANNER IN WHICH THE TEXTS OF THE ROMAN LAW ARE REFERRED TO IN THE FOREGOING TREATISE.

THE several parts of the CORPUS JURIS CIVILIS, which are principally referred to in *The Civil Law in its Natural Order*, are the *Institutes*, *Digest* or *Pandects*, *Code*, and *Novels*.

The INSTITUTES are divided into four *books*, each of which is divided into *titles*, which are severally subdivided into *sections* or *paragraphs*.

The DIGEST is divided into fifty *books*, each book into *titles*, each title into *laws* (sometimes also called *fragments*), and many of the laws into *sections* or *paragraphs*. Books 30, 31, and 32, which treat of legacies and trusts, are not divided into several titles, but contain each of them a single title only, with the same rubric, namely, *de legatis et fideicommissis*.

The CODE is divided into twelve *books*, each book into *titles*, each title into *laws*, and the laws frequently into *paragraphs* or *sections*, in the same manner with the Digest.

The NOVELS, or NEW CONSTITUTIONS, are numbered, and divided into chapters.

The several books, titles, laws, and paragraphs are numbered consecutively. The titles only have a rubric.

The general plan of reference to the Institutes, Digest, and Code is by the rubric of the *title*, or, where the rubric is long, by the first two or three words of it, with the number of the *law*, and also of the *paragraph* where the law cited is thus divided. The words of the title are usually abbreviated.

The Digest is denoted by the letter *D.*; the Institutes, by the letter *I.*, or the abbreviation *Inst.*; the Code, by the letter *C.*, or *Cod.*; the Novels, by the letter *N.*, or *Nov.*

The letter *L.* is used to designate a *law*; the sign §, a *paragraph* or *section* of a law.

The mode of reference will be best explained by a few examples.

L. 2, *D. de fidej. et mand.* — This reference denotes the second law of the title of the Digest *de fidejusscribus et mandatoribus*, which will be found by reference to the subjoined table to be the first title of the forty-sixth book.

L. 29, § 6, *D. mand.* — This refers to the sixth section or paragraph of the twenty-ninth law of the title of the Digest *mandati vel contra*, which is the first title of the seventeenth book.

L. 10, § *ult. D. mand.* — The last paragraph of the tenth law of the same title of the Digest.

L. 1, *C. de fidej. min.* — The first law of the title of the Code *de fidejussoribus minorum*, which is the twenty-fourth title of the second book.

§ 1, *Inst. de duob. reis.* — Institutes, the first paragraph of the title *de duobus reis stipulandi et promittendi*, which is the sixteenth title of the third book.

L. pen. C. de non num. pec. — The last law but one of the title of the Code *de non numerata pecunia*, which is the thirtieth title of the fourth book.

The abbreviation *eod.* denotes the title given in the reference next immediately preceding: thus, *L.* 9, § *ult. eod.*, immediately following the reference *L.* 20, § 2, *D. de pign. act.*, denotes the last paragraph of the ninth law of the title of the Digest *de pignoratitia actione vel contra*, which is the seventh title of the thirteenth book.

If the last reference be to a different part of the Corpus Juris Civilis from the first, the part referred to is designated by the proper letter or abbreviation: thus, *L. ult. Cod. eod.*, following immediately after *L.* 4, *D. in quib. caus. pign. vel hyp. tac. contr.*, which is the second title of the twentieth book of the Digest, denotes the last law of the Code contained in the title bearing the same rubric with the title of the Digest referred to, namely, the fifteenth title of the eighth book, *in quibus causis pignus vel hypotheca tacite contrahitur.*

The words *in fine*, or the abbreviations *in fin.*, *in f.*, denote that the particular passage referred to is *at the end* of the law or paragraph thus designated.

The letters *D. l.* denote the *said law*, that is, the law designated by the reference next immediately preceding. *D. ll.* are used when more than one law is referred to. *D. t.*, the *said title*. *D.* §, the *said section* or *paragraph*.

Some of the titles contain but a single law. When this is the case, the reference is in this form: *L. un. C. ut caus. post pubert. ads. tut.*, or the only law in the title of the Code *ut causæ post pubertatem adsit tutor*, which is the forty-eighth title of the fifth book.

The words *in principio*, or the abbreviations *in pr.*, *in prin.*, denote the *beginning* of the law, or of the other particular part referred to. Where a law is divided into several paragraphs, the first is not numbered, and is referred to in this manner. Thus, by *L.* 1, *in prin. D. de calumniat.*, is meant the paragraph at the beginning of the first law of the title of the Digest *de calumniatoribus*, which is the sixth title of the third book.

L. 71, *in f. princ. D. de fidej. et mand.* — At the end of the paragraph commencing the law seventy-first, &c.

The letter *V.*, as *V. l.* 1, § 3, &c. (that is, *see* the passage referred to), indicates that the law designated is referred to, not as directly, but only by analogy, supporting the principle to which it is cited.

L. un. § 7, *versic. sin autem, Cod. de rei ux. act.* — This refers to the seventh paragraph of the only law of the Code, book fifth, title thirteen, *de rei uxoriæ actione*, &c., at the sentence commencing with the words *sin autem*.

The three books 30, 31, and 32 of the Digest, which treat of legacies and trusts, each of which contains but a single title, with the rubric *de legatis et fideicommissis*, are referred to as *de legat.* 1, *de legat.* 2, *de legat.* 3. Thus, *L.* 37, § 5, *D. de legat.* 3, denotes the Digest, book 32, law 37, § 5.

According to a still more ancient mode of reference, which occurs once or twice, the initial words of the law cited are given instead of its number. Thus, *L. si ut certo, D. Commodati vel contra*, denotes the fifth law of the sixth title of the Digest, book 13.

A TABLE

OF THE RUBRICS OF THE SEVERAL TITLES OF THE INSTITUTES, DIGEST, AND CODE, ARRANGED IN ALPHABETICAL ORDER.

A.

de Abigeis. D. 47, 14. C. 9, 37.
de Abolitionibus. C. 9, 42. D. 48, 16.
de Acceptilatione. D. 46, 4.
de Acceptilationibus. C. 8, 44.
de Accusationibus et inscriptionibus. D. 48, 2. C. 9, 2.
de Acquirenda et retinenda possessione. C. 7, 32.
de Acquirenda vel amittenda possessione. D. 41, 2.
de Acquirenda vel omittenda hereditate. D. 29, 2. C. 6, 30.
de Acquirendo rerum dominio. D. 41, 1.
de Acquisitione per arrogationem. I. 3, 10.
de Actione rerum amotarum. D. 25, 2.
de Actionibus. I. 4, 6.
de Actionibus emti et venditi. D. 19, 1. C. 4, 49.
de Actore a tutore vel curatore dando. C. 5, 61.
de Ademtione legatorum. I. 2, 21. D. 34, 4.
de Ademtione libertatis. D. 40, 6.
Ad exhibendum. D. 10, 4. C. 3, 42.
de Adimendis vel transferendis legatis. D. 34, 4. I. 2, 21.
Ad legem Aquiliam. D. 9, 2. I. 4, 3. C. 3, 35.
Ad legem Corneliam de falsis. C. 9, 22. D. 48, 10.
Ad legem Corneliam de sicariis. D. 48, 8. C. 9, 16.
Ad legem Fabiam de plagiariis. C. 9, 20. D. 48, 15.
Ad legem Falcidiam. D. 35, 2. C. 6, 50. I. 2, 22.
Ad legem Juliam de adulteriis. D. 48, 5. C. 9, 9.
Ad legem Juliam de ambitu. C. 9, 26. D. 48, 14.
Ad legem Juliam majestatis. D. 48, 4. C. 9, 8.
Ad legem Juliam peculatus, etc. D. 48, 13. C. 9, 28.
Ad legem Juliam repetundarum. C. 9, 27. D. 48, 11.
Ad legem Juliam de vi publica. D. 48, 6. C. 9, 12.
Ad legem Juliam de vi privata. D. 48, 7. C. 9, 12.
Ad legem Viselliam. C. 9, 21.
de Administratione et periculo tutorum et curatorum, etc. D. 26, 7.
de Administratione rerum ad civitates pertinentium. D. 50, 8.
de Administratione rerum publicarum. C. 11, 30.
de Administratione tutorum vel curatorum, etc. C. 5, 37.
Ad municipalem et de incolis. D. 50, 1.
de Adoptionibus. I. 1, 11. C. 8, 48.
de Adoptionibus et emancipationibus, etc. D. 1, 7.
Ad SC. Macedonianum. C. 4, 28. D. 14, 6.
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